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# Purple Haze:<sup>1</sup>

## Military Justice in Support of Joint Operations

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### SITUATION (fictional):

*Pirates raiding out of Indonesia's former island of Sumatra have effectively closed the Straits of Malacca to international shipping. Having welcomed Taliban and al Qaeda refugees fleeing American oppression in Afghanistan and Pakistan, Sumatra declared independence from the spiritually corrupt government of Indonesia. The fundamentalist island has become the world's leading sponsor of anti-American terrorism and regional piracy. The United States is organizing Joint Task Force Budi Utomo (JTF BU) to help restore international peace and security to the region. Joint Task Force BU will consist of Army, Navy, Air Force, and Marine Corps personnel assigned by Pacific Command, and will be commanded by Brigadier General Phightshard, Deputy Commander, I Corps, Fort Lewis, Washington. Having been recently assigned to Fort Lewis, you were handpicked by the staff judge advocate (SJA) to be the JTF Commander's legal advisor. The SJA reminds you that "Justice is Job #1," and tells you to get ready to deploy.*

### Introduction

Hazy or not, "purple" justice is a reality.<sup>2</sup> Judge advocates will increasingly find themselves operating within a joint environment, and they must be prepared to conduct justice matters

regardless of their service, the service of the commanders they serve, and the service of the accused. Many publications explicitly or implicitly state that judge advocates must be prepared to execute joint justice quickly, professionally, and flawlessly; however, none of these sources explain how to do it.<sup>3</sup> Even the *Special Operations Force's Commander's Legal Handbook*, a publication from a command steeped in "jointness," does not address the administration of justice in a joint environment.<sup>4</sup>

### Overview

This article addresses three distinct problem areas in the practice of joint justice: jurisdiction, court-martial convening authority level, and the administration of nonjudicial punishment (NJP) in a joint environment. The first problem area results from the general lack of familiarity judge advocates have with the practical aspects of establishing judicial and nonjudicial jurisdiction. The second area relates to the practice, or habit, of not regularly giving joint commanders general court-martial convening authority. The third problem area derives from service specific regulations pertaining to NJP. Although joint commanders clearly have the authority to administer NJP over members from all services, there seems to be a cultural hesitance to exercise this authority.

Task Force Falcon (TFF), in Kosovo, is a recent example of how fractured and potentially frustrating justice matters can be

1. Jimi Hendrix, *Purple Haze*, on ARE YOU EXPERIENCED? (MCA Records 1967). "Purple haze all in my brain, lately things they don't seem the same." *Id.*

2. See, e.g., United States v. Egan, 53 M.J. 570 (Army Ct. Crim. App. 2000). Egan was an Army specialist assigned to a joint unit (the Joint Analysis Center (JAC)) commanded by an Air Force colonel, tried at a special court-martial convened by the Air Force colonel, and presided over by an Army judge. "The trial counsel was an Air Force officer. The appellant's trial defense team contained military attorneys from both the Army and the Air Force." *Id.* at 572. When the case was presented to the appropriate Army general court-martial convening authority (GCMCA), the GCMCA declined to refer charges. The JAC Commander subsequently referred identical charges to a special court-martial based upon a U.S. European Command (EUCOM) directive granting the JAC Commander that authority. Although the appellant argued that language in the directive prohibited such a referral, the court found that the directive's language was permissive in nature. The appellant further argued that the EUCOM directive restricted the JAC Commander from adjudging a bad-conduct discharge because it tied the convening authority to the Army's military justice regulation, which specifically limits special court-martial convening authority. While the court agreed that joint regulations might be written to displace the court-martial processing requirements of service regulations, the court found the EUCOM directive ambiguous in this regard and resolved the issue in the appellant's favor. *Id.*

3. See, e.g., INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK ch. 27 (2002) [hereinafter OpLaw Handbook] (containing discussion of reviewing JTF operations plans using the "FAST-J" method, which specifically prompts the judge advocate to address the areas of jurisdiction (joint or service specific), convening authorities, and military justice support, but does not give any detail on how to do it or what issues might be important). See generally Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 66 (1996) (containing a brief discussion of the importance of being prepared to conduct joint justice).

4. SOF COMMANDER'S LEGAL HANDBOOK CD-ROM ch. 1, at 4 (1 Feb. 2001) (BETA Version).

in a joint environment.<sup>5</sup> The task force consisted of members from every service. The Task Force Commander—the Assistant Division Commander—did not have inherent court-martial convening authority and was never given court-martial convening authority over the service members assigned to him.<sup>6</sup> The Division Commander, not present with TFF, maintained general court-martial convening authority over division soldiers and some soldiers attached to the division.<sup>7</sup> “The Division Commander did not gain jurisdiction, however, over all U.S. troops within the Task Force . . . .”<sup>8</sup> The Division Commander and his successors “did not exercise court-martial jurisdiction over Army special operation and civil affairs forces, and they had no jurisdiction over service members from other branches.”<sup>9</sup>

As a result of the fractured jurisdiction, the TFF Commander faced administering justice through a minimum of five general court-martial convening authorities (GCMCAs).<sup>10</sup> The jurisdictional scheme apparently frustrated TFF legal advisors, who noted that offending service members of some “jurisdictionally excluded” units “were often merely returned to their home station with no action taken.”<sup>11</sup>

A joint commander’s lack of general court-martial convening authority also affects matters outside of military justice. Court-martial convening authority is a power woven through the three functional areas of legal support to operations—command and control, sustainment, and personnel service support—and extends beyond strictly military justice functions.<sup>12</sup> Because court-martial convening authority has historically been a power vested with command, non-disciplinary regulations often employ the GCMCA as a reviewing, approving, or appellate authority.<sup>13</sup> Hence, the impact of not vesting a multi-service commander with this authority is felt beyond criminal justice matters.

The TFF experience described above echoes the concerns voiced by Lieutenant Colonel Marc Warren in his 1996 *Military Law Review* article:

Judge advocates must have a clear understanding of how to create provisional units and transfer jurisdiction; how to establish courts-martial convening authorities; and how to administer “joint justice” in a [JTF]. Although the legal authority already exists, and joint doctrine and implementing regulations are maturing, practical experience in “joint justice” is limited. The growing role of the joint force commander will reduce the role of the component commander. As a result, the impact of component regulations and policies will diminish, and divergence among the regulations and policies will become increasingly vestigial. Absent compelling reason to the contrary, joint force commanders should have clear disciplinary authority over their subordinates. Their judge advocates must push to make it happen.<sup>14</sup>

Despite the years passed since this passage was written, surprisingly little has been done to address the issues it raises. This article addresses several of these issues, highlights some of the command discipline/criminal law challenges that may confront a judge advocate supporting a joint commander, and suggests some practical solutions to conducting justice in a joint environment. The goals of this article are to demystify this area of criminal law practice, to provide a roadmap for chiefs of justice and their trial counsel to better prepare them for addressing jurisdictional issues with their joint commanders, to propose a systemic solution to the convening authority problem, to com-

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5. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN KOSOVO: 1999-2001, 141 (2002) [hereinafter KOSOVO OPERATIONS BOOK]; see also CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS: 1995-1998, 172 (1998) [hereinafter BALKANS OPERATIONS BOOK]. The *Balkans Operations Book* discusses the options used there to structure general court-martial convening authority, but does not comment on their efficacy. *Id.* at 170-71. The only mention of joint justice is a footnote comment that sister services handled UCMJ actions for non-Army U.S. military personnel assigned to the theater. See *id.* at 172 n.468.

6. KOSOVO OPERATIONS BOOK, *supra* note 5, at 141.

7. *Id.*

8. *Id.*

9. *Id.* at 142 n.174.

10. This figure corresponds to one GCMCA for the following categories of personnel: the Army units assigned to the division, the special operations and civil affairs units, the Navy, the Air Force, and the Marines.

11. KOSOVO OPERATIONS BOOK, *supra* note 5, at 142 n.175.

12. See U.S. DEP’T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS vii (1 Mar. 2000) [hereinafter FM 27-100].

13. See *infra* notes 87-92 and accompanying text.

14. Warren, *supra* note 3, at 66 (citations omitted). This passage was the catalyst and primary basis for the organization of this article.

pare and contrast adverse administrative actions and NJP among the services, and to present practical considerations for administering justice in a joint environment.

The article primarily focuses on managing military justice matters in light of the difficulties posed by joint operations. Secondly, the article provides methods of establishing a more unified courts-martial structure, thereby improving the efficiency and equality of justice administered in a joint environment. To provide additional focus for some of the issues raised, the article presents situational vignettes building upon the introductory JTF BU vignette.

Before discussing the three main issues this article presents—jurisdiction, court-martial convening authority level, and the administration of NJP in a joint setting—a historical perspective and an overview of the broader issues that surround joint justice are helpful.

### *Historical Background and Current Status*

The Constitution grants Congress the power to make rules governing land and naval forces.<sup>15</sup> The Uniform Code of Military Justice (UCMJ) embodies that congressional power as it pertains to the administration of justice within the military.<sup>16</sup> The Goldwater-Nichols Act<sup>17</sup> created the joint environment in which the military now operates, and it revised portions of the *Manual for Courts-Martial (MCM)*<sup>18</sup> to give unified and specified combatant commanders more authority.<sup>19</sup> The legislative history of Goldwater-Nichols indicates an intention for combatant commanders to have authority over all aspects of military justice within their commands.<sup>20</sup> “Nonetheless, the implementing rules and procedures of military justice have not evolved to

fully satisfy the congressional intent of [Goldwater-Nichols] with regard to the [combatant commander’s] prerogative . . . .”<sup>21</sup>

The lack of evolution may be due in part to the dichotomy of the military’s national command structure. Individual services are responsible for training and making forces available, while the combatant commands are responsible for actual warfighting. Committing to, or promulgation of, a joint-justice regulation gives the impression that the services are somehow relieved of their responsibility for disciplining the force that the *MCM* places upon them.<sup>22</sup>

Other impediments to a joint-justice regulation include service idiosyncrasies in both NJP procedures and in the administration of trial and post-trial matters. Service regulations, which control these areas of military justice, contain some striking differences.<sup>23</sup> Also, provisions of the UCMJ can cause slight variances in the practice of military justice. For example, service members embarked on a naval vessel cannot refuse NJP and demand trial by court-martial.<sup>24</sup> This provision causes Navy and Marine Corps judge advocates to approach Article 15, UCMJ, advice differently than Army and Air Force judge advocates, who are trained to consider and advise commanders always on the practical aspects of Article 15 turn downs.<sup>25</sup> The net effect of these differences has been the development of service-specific military justice cultures.

The Service Judge Advocates General devoted two recent meetings to the issue of joint justice.<sup>26</sup> Although they have discussed changing the *MCM* to clarify and simplify joint-justice issues and considered drafting a joint military-justice publication, they do not currently have a consensus. While a general agreement concerning joint justice exists, the services are not likely to agree on specific *MCM* changes or on a joint regula-

15. U.S. CONST. art. I, § 8.

16. See 10 U.S.C. §§ 801-946 (2000).

17. 1986 DOD Reorganization Act, Pub. L. No. 99-433, 100 Stat. 1013 (codified as amended at 10 U.S.C. § 164). See generally Captain William H. Walsh & Captain Thomas A. Dukes, Jr., *The Joint Commander as Convening Authority: Analysis of a Test Case*, 46 A.F. L. REV. 195 (1999).

18. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000) [hereinafter MCM].

19. See 10 U.S.C. § 164.

20. Lieutenant Colonel (LtCol) Mike Finnie, United States Marine Corps (USMC), Joint Staff Legal Office, Monograph of the Goldwater-Nichols Legislative History Regarding Military Justice in a Joint Environment (Aug. 2, 2000) [hereinafter Finnie Monograph] (citing H.R. REP. NO. 90-4370 (1986)) (on file with author).

21. *Id.* at 1.

22. Telephone Interview with LtCol R. Gary Sokoloski, USMC, Chairman, Joint Services Committee on Military Justice (Mar. 20, 2002) [hereinafter Sokoloski Interview]. Lieutenant Colonel Sokoloski also serves as Head, Military Law Branch, Judge Advocate Division, Headquarters, USMC. *Id.*

23. See generally U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (20 Aug. 1999) [hereinafter AR 27-10]; U.S. DEP’T OF NAVY, MANUAL OF THE JUDGE ADVOCATE GENERAL ch. 1 (C3, 3 Oct. 1990) [hereinafter JAGMAN], available at <http://192.156.19.100/Pubs/jagman/frameset/htm>; U.S. DEP’T OF AIR FORCE, INSTR. 51-202 NON-JUDICIAL PUNISHMENT (1 July 2002) [hereinafter AFI 51-202], available at <http://afpubs.hq.af.mil/pubfiles/af/51/afi51-202.pdf>.

24. UCMJ art. 15(a) (2000).

25. Article 15, UCMJ, gives commanders NJP authority. See *id.* Practitioners commonly use the term “article 15” as short-hand for NJP authority and NJP proceedings.

tion “during the annual review of military justice matters currently being conducted by the Joint Service Committee on Military Justice.”<sup>27</sup>

While differences do exist, none of the differences create insurmountable obstacles to performing military justice in a joint environment.

## Jurisdiction<sup>28</sup>

### SITUATION:

*As you ponder where to begin your support of JTF BU, the deputy SJA pulls you aside and tells you a horror story about how bad morale became on her deployment to Haiti due to fractured military jurisdiction,<sup>29</sup> and she recommends that you get an early handle on jurisdictional chains.*

The area of joint justice that may vex commanders the most is how it affects unity of command.<sup>30</sup> The power of command is tied to the power to discipline the force. As discipline authority becomes more fractured, a commander’s ability to enforce

his orders becomes more difficult. A continuing issue in the joint-justice arena is how to overcome the unity of command dilemma created by a fractured authority to convene courts-martial.<sup>31</sup> The obvious solution to this problem is to eliminate the fractures by giving the joint commander the court-martial convening authority commensurate with his command position. Resolving this issue gives the commander the authority to enforce his orders; however, even after achieving unity of command, the legal practitioner remains faced with administering justice within service-specific regulations.

### Jurisdictional Basis

Jurisdiction is based in the command structure. The Service Secretaries, as directed by the Secretary of Defense,<sup>32</sup> assign all military forces to one of nine combatant commands.<sup>33</sup> Because most forces are stationed in the United States, but have a regional orientation to support another geographic combatant command, the Secretaries assign the majority of forces to Joint Forces Command.<sup>34</sup> When necessary, orders must be produced to transfer forces within the jurisdiction of a combatant command or from one combatant command to another.<sup>35</sup> To provide clear and cohesive command authority when this occurs, the

26. Sokoloski Interview, *supra* note 22; Telephone Interview with LTC William T. Barto, Acting Chief, Criminal Law Division, Office of the Judge Advocate General, U.S. Army (Mar. 11, 2002) [hereinafter Barto Interview] (referring to Service Judge Advocates General meetings in October 2001 and February 2002).

27. Sokoloski Interview, *supra* note 22; Barto Interview, *supra* note 26. See generally Department of Defense: Joint Service Committee on Military Justice, 67 Fed. Reg. 35,507 (May 20, 2002).

28. “Jurisdiction” as used in this context refers to administrative control over service members. The current *OpLaw Handbook*, in a change from prior editions, conceptualizes this use as describing “venue” (that is, choice of the appropriate commander) as opposed to a court’s legal authority as defined in Rule for Courts-Martial 201. Compare *OpLaw Handbook*, *supra* note 3, at 182, with MCM, *supra* note 18, R.C.M. 201. Judge advocates should recognize that, in accordance with UCMJ Article 17, court-martial jurisdiction is “universal.” Any officer vested with court-martial convening authority may refer any service member, regardless of service and unit, to a court-martial convened by that officer. The practical aspects of exercising this broad referral authority are (1) administrative control, and (2) coordination between commands with concurrent administrative control over a service member. Unlike court-martial convening authority, nonjudicial punishment (NJP) authority is limited to “commanders,” and commanders may only administer NJP to members of their command. MCM, *supra* note 18, pt. V, ¶ 2a.

29. See Major Michael J. Berrigan, *The UCMJ and the New Jointness: A Proposal to Strengthen the Military Justice Authority for Joint Task Force Commanders*, 44 NAVAL L. REV. 59, 69 (1997). The disparate treatment of soldiers and subsequent morale issues in Haiti resulted from both inter-service and intra-service jurisdictional fractures. *Id.*

30. See generally *id.* (containing a full discussion of this debate); JOINT CHIEFS OF STAFF, JOINT PUB. 0-2, UNIFIED ACTION ARMED FORCES (UNAAF) III-1 (10 July 2001) [hereinafter JOINT PUB. 0-2].

31. See Berrigan, *supra* note 29, at 85-103.

32. 10 U.S.C. §162(a) (2000).

33. The military currently has four geographic and five functional unified commands: European Command, with responsibility for Europe and parts of the Middle East and Africa and surrounding waters; Pacific Command, with responsibility for the Pacific Ocean, Southeast Asia and the Pacific and Indian Ocean rims; Southern Command, with responsibility for the Caribbean and Central and South America; Central Command, with responsibility for Southwest Asia, Eastern Africa and part of the Indian Ocean; Joint Forces Command, with responsibility as the joint force provider of its assigned continental United States-based forces and as the lead joint force integrator and trainer; Transportation Command, with responsibility for global transportation; Special Operations Command, with responsibility for training and equipping special operations forces; Space Command, responsible for air, missile and space defense; and Strategic Command, responsible for nuclear deterrence. JOINT PUB. 0-2, *supra* note 30, at II-14 to II-16.

The U.S. military will formally establish Northern Command on 1 October 2002. It will become the fifth geographic unified command, with responsibility for North America and adjacent waters. Space Command and Strategic Command will likely merge to maintain the total number of unified commands at nine. Colin Robinson, Center For Defense Information, *Northern Command Finally Announced: Details Still to Be Worked Through* (Apr. 24, 2002), at <http://www.cdi.org/terrorism/northcom.cfm>.

34. JOINT PUB. 0-2, *supra* note 30, at II-14.

assignment orders normally should include assignment for purposes of courts-martial and general administration of military justice.<sup>36</sup>

Units formed for contingency operations do not always flow together as well as the above paragraph might suggest, and recent experience indicates that judge advocates must prepare to manage ad hoc jurisdiction if time or circumstances prevent better establishment of jurisdictional chains.<sup>37</sup> The challenge for operational attorneys as a contingency develops is to back up a unified command authority with a cohesive jurisdictional chain for military justice. Army legal doctrine recognizes the need for judge advocates to advise commanders on, and help provide for, continuity in jurisdiction; however, the actual tasks of jurisdiction transfer and creation of provisional units are outside the normal focus of judge advocates.<sup>38</sup> Judge advocates must understand these tasks to ensure that jurisdictional chains are as strong as possible.

### *Creating Provisional Units and Transferring Jurisdiction*

To ensure clarity of jurisdiction, judge advocates must understand the processes for creating provisional units and transferring jurisdiction. Provisional units are

temporary units (not to exceed 2 years) composed of personnel detached from their unit of assignment and created under authority of [Army Regulation 220-5].<sup>39</sup> Provisional units are often used to create a UCMJ structure or fill gaps in UCMJ authority of a convening authority. They help to ensure that commanders at all levels are available to process UCMJ and administrative actions.<sup>40</sup>

Most importantly for deploying judge advocates, the use of provisional units is not limited to filling jurisdictional gaps at home station. Provisional units may also be used to fill jurisdictional gaps in deploying units or to account for personnel not otherwise attached to a specific unit for UCMJ purposes.

The Army's *Operational Law Handbook* reminds military justice supervisors preparing for deployment to "[e]nsure orders assigning units and personnel clearly indicate which commanders have nonjudicial punishment and court-martial authority."<sup>41</sup> This task is important even with single-service deployments because units will inevitably be divided into deploying and home-station units. Reorganizing and restacking units due to mission requirements also complicates this task.<sup>42</sup> The joint environment further increases the complexity of reorganization, and requires that judge advocates pay particular attention to ensure the jurisdictional plans cover all units and personnel for UCMJ purposes. As noted below, orders are not legal authority for establishing court-martial convening authority. Instead, they serve to clarify statutory or regulatory authority. Only Army legal doctrine, however, focuses judge advocates on this issue.<sup>43</sup>

### *Timing*

The most efficient time for judge advocates to address jurisdiction issues is early in the process of creating a joint force. Judge advocates can ensure the proper establishment of jurisdictional chains much easier before a unit departs home station than after deployment. Pre-deployment, the necessary decision makers and participants are readily available, thereby drastically reducing the need for re-issuance of assignment orders.<sup>44</sup>

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35. See generally JOINT CHIEFS OF STAFF, JOINT PUB. 0-5, DOCTRINE FOR PLANNING JOINT OPERATIONS (13 Apr. 1995) [hereinafter JOINT PUB. 0-5].

36. AR 27-10, *supra* note 23, para. 3-8(a)(4).

37. Telephone Interview with Colonel (COL) Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division and Coalition Joint Task Force (CJTF)—Mountain in Uzbekistan and Afghanistan from 3 December 2001 to 13 June 2002. (June 18, 2002) [hereinafter Stone Interview]; see also CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH: 1998-1999, 121 (15 Sept. 2000) [hereinafter HURRICANE MITCH BOOK]. Not only did COL Stone's unit deploy without knowing who would comprise the CJTF, units and slice elements arrived in theater with orders no more specific than assigning them to the "Central Command area of responsibility" rather than to any particular unit. Stone Interview, *supra*.

38. FM 27-100, *supra* note 12, at vii, 3-5. See generally U.S. DEP'T OF ARMY, REG. 600-8-105, MILITARY ORDERS (28 Oct. 1994) [hereinafter AR 600-8-105].

39. U.S. DEP'T OF ARMY, REG. 220-5, DESIGNATION, CLASSIFICATION, AND CHANGE IN STATUS OF UNITS para. 2-5 (3 Sept. 1991) [hereinafter AR 220-5].

40. OPLAW HANDBOOK, *supra* note 3, at 185 n.153 (internal footnote added).

41. *Id.* at 185. See also FM 27-100, *supra* note 12, at 3-5.

42. OPLAW HANDBOOK, *supra* note 3, at 184.

43. FM 27-100, *supra* note 12, at vii.

Ensuring the establishment of a proper joint-unit jurisdictional chain involves the same process that incoming chiefs of justice undertake to ensure that all units on their installations are properly assigned for court-martial convening purposes. Creating a wire diagram of the proposed task force is a good way to guarantee that the command has jurisdiction over all assigned units and personnel. This process serves a dual purpose: it forces staff sections to produce an accurate wire diagram, and it forces the command to think proactively about military justice.

Because the J3/G3/S3 staff section is responsible for plans and training, and the J4/G4/S4 staff section is responsible for logistical support to the units,<sup>45</sup> coordinating with these two staff sections is an efficient way for judge advocates to ascertain which units the command expects to participate in a given deployment. The wire diagram enables judge advocates to help other staff sections logically organize the prospective chain of command. Further, through the process of creating the diagram, judge advocate can identify the need for provisional units to shore up any jurisdictional holes.

The best course of action for judge advocates brought in after the formation of the task force is to review all attachment orders for jurisdictional deficiencies. When judge advocates determine that a unit has been improperly excluded, they

should coordinate with the command section and the J3/G3/S3 to determine how jurisdiction should be organized. Once the command approves a jurisdictional scheme, the commander's staff can then produce orders which reflect his intent.

*Authority for Creating Provisional Units and Transferring Jurisdiction*<sup>46</sup>

Because only Army legal doctrine views this as part of judge advocate responsibilities,<sup>47</sup> the discussion below focuses on those Army personnel vested with order production authority, and outlines what judge advocates should provide those authorities to ensure publication of jurisdictionally appropriate orders. Deploying judge advocates should coordinate with sister-service units to guarantee proper assignment for military justice purposes. Judge advocates should pay careful attention to the differing notice requirements services have for the establishment of units, specifically for the administration of nonjudicial discipline in a multi-service environment.<sup>48</sup>

Whether orders are required to create provisional units, or they are simply needed to assign a unit to the task force, orders production is a function of the "adjutant general, adjutant, or other authorized individual charged with headquarters administration."<sup>49</sup> Although authority to publish orders may be delegated below installation level, the authority is usually maintained at a military personnel work center at Headquarters,

44. HURRICANE MITCH BOOK, *supra* note 37, at 121.

Resolving UCMJ jurisdictional issues occupied a significant amount of the deployed JA's time. Brigade and Group commanders were all designated Special Courts-Martial Convening Authorities (SPCMCA) prior to deployment. However, several smaller provisional unit commanders, including battalion-size unit commanders, did not have courts-martial convening authority because their designation as a provisional unit commander did not include this authorization. General courts-martial convening authorities (GCMCA) can establish deployment contingency plans, which when executed, designate provisional units whose commanders have SPCMCA . . . .

Some provisional units deployed without orders assigning or attaching their personnel to the provisional unit for military justice purposes, although all provisional unit commanders had assumption of command orders.

*Id.*

45. See generally U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS (31 May 1997) [hereinafter FM 101-5]; JOINT PUB. 0-2, *supra* note 30.

46. See generally AR 600-8-105, *supra* note 38, para. 1-11b; U.S. DEP'T OF AIR FORCE, INSTR. 38-101, MANPOWER AND ORGANIZATION para. 4.3.4 (1 July 1998) (discussing Air Force construction of provisional units), available at <http://afpubs.hq.af.mil/pubfiles/af/38/afi38-101/afi38-101.pdf>.

47. See FM 27-100, *supra* note 12, at vii, 3-5.

48. Army and Naval regulations permit multi-service commanders to designate service-specific units and commanders for the administration of nonjudicial discipline. See AR 27-10, *supra* note 23, para. 3-7b (requiring a copy of any such designation provided to The Judge Advocate General of the Army, Criminal Law Division); JAGMAN, *supra* note 23, § 0106d (requiring a copy of any such designation provided to the Chief of Naval Personnel, or the Commandant of the Marine Corps and The Judge Advocate General of the Navy). The Air Force, on the other hand, does not permit multi-service commanders to designate an Air Force specific unit for nonjudicial discipline purposes, and hence does not require any notification. The Air Force arguably provides for the same effect, however, by defining the following as "commanders" for administration of nonjudicial discipline: the "Commander, Air Force Forces (COMAFFOR), which is an officer designated from the U.S. Air Force who serves as the commander of all U.S. Air Force forces assigned or attached to the U.S. Air Force component in a joint or combined operation;" the "commander of an Air Force element, [including Air Force elements of a joint or combined command or task force or other activity outside the Air Force], if designated to function as a unit pursuant to AFI 38-101, *Air Force Organization*;" and the "Senior Air Force Officer (SAFO) in the headquarters staff organization of a unified command, subordinate unified command, joint task force, combined command or combined task force." AFI 51-202, *supra* note 23, paras. 2.2, 2.2.2-3, 2.2.5.

49. AR 600-8-105, *supra* note 38, para. 1-11b. See generally AR 220-5, *supra* note 39.

Department of the Army; major command; or installation level.<sup>50</sup> At the installation level, the Personnel Service Company (PSC) will probably be the responsible section. If not, judge advocates should start with the PSC to determine who has the authority to produce orders.

Authorities may publish orders for several purposes. Most importantly, they have the authority to publish orders to mobilize and demobilize individuals and units,<sup>51</sup> and to “[a]ctivate, inactivate, organize, reorganize, designate, re-designate, discontinue, assign, and reassign all types of U.S. Army controlled organizations and units, and attach one unit to another.”<sup>52</sup> This authority gives the command the flexibility to task organize and create jurisdictional chains of command that ensure the discipline of that organization.

Although *Army Regulation (AR) 600-8-105*, the Army’s regulation on military orders, contains many order formats, it does not contain specific language for unit activation or assignment, nor suggested specific language to describe assignment for courts-martial jurisdiction or the general administration of military justice matters. Suggested language can, however, be found in *AR 27-10, Military Justice*.<sup>53</sup> Judge advocates should coordinate with the J1/G1/S1 section to check that all orders assign personnel and units to the task force properly and include court-martial and administrative military justice authority over each person and unit. Failure to have this suggested language will not prevent the exercise of Article 15 authority; however, inclusion may resolve the issue decisively.<sup>54</sup>

Keeping up with changes to the units that comprise a task force may prove very difficult, especially when the task force has been deployed in support of a mission with a rapidly changing political or military situation. The Haiti and Hurricane Mitch deployments are examples of how fluid the chain of command can get in a developing situation.<sup>55</sup> Some situations may be so dynamic that a complete jurisdictional solution may not be possible.<sup>56</sup> Despite this challenge, judge advocates should avoid the temptation to simply wait until things settle down before seeking joint UCMJ authority or engaging in the establishment of jurisdiction. Although a fluid situation may frustrate these measures, failing to take action early will make overcoming the inertia of fractured jurisdictional chains more difficult or impossible.<sup>57</sup>

While having well-established jurisdictional chains reflected in assignment orders is clearly desirable, as mentioned above, it is not a condition precedent to the exercise of NJP authority. Even absent direct language in assignment orders, commanders are vested with NJP authority and may exercise that authority over service members within their actual control.<sup>58</sup> The fact that *AR 27-10* includes suggested jurisdictional language tends to mislead commanders and judge advocates to believe that such language is required for a commander to exercise NJP authority: There is no such requirement. Although jurisdictional language in orders certainly clarifies the authority for all parties concerned, the authority to administer NJP is derived from the functional command relationship, not from the language of assignment orders.<sup>59</sup> In ad hoc command situa-

50. AR 600-8-105, *supra* note 38, para. 1-11b. “Authority to delegate below installation level is vested in the adjutant general subject to the limitations imposed in paragraph 1–16 [of *Army Regulation 600-8-105*].” *Id.*

51. *Id.* para. 1-11a(6).

52. *Id.* para. 1-11a(5).

53. See AR 27-10, *supra* note 23, para. 3-8(a)(4). This paragraph states that “[i]f orders or directives include such terms as ‘attached for administration of military justice,’ or simply ‘attached for administration,’ the individual so attached will be considered to be of the command, of the commander, of the unit of attachment for the purpose of Article 15.” *Id.*

54. *Id.* para. 3-8(a).

55. See Berrigan, *supra* note 29, at 67-71. The Haiti deployment is also an example of an SJA advising against seeking joint UCMJ authority based on the fluidity of the jurisdictional situation. See *id.*; see also HURRICANE MITCH BOOK, *supra* note 37, at 121.

56. Berrigan, *supra* note 29, at 67-71.

57. *Id.* Even after the operation became relatively stable, no attempt was made to seek joint UCMJ authority. *Id.*

58. See MCM, *supra* note 18, pt. V, ¶ 2a. “Unless otherwise provided by regulations of the Secretary concerned, a commander may impose nonjudicial punishment upon any military person of that command.” *Id.* Absent jurisdictional language within an assignment order, judge advocates can look for a description of the command relationship within the orders to help determine jurisdiction. While Operational Control (OPCON), Tactical Control (TACON), and Administrative Control (ADCON) may all be used to describe command relationships, and none of these relationships are dispositive, ADCON is doctrinally more authoritative in determining jurisdiction because it is defined to include disciplinary control. See JOINT PUB. 0-2, *supra* note 30, at III-11.

59. Although functional command relations will probably suffice for determining who should exercise NJP over a service member, judge advocates should not overlook the possibility of using territorial jurisdiction as a fallback position. “‘Commander’ means a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a ‘command.’” MCM, *supra* note 18, pt. V, ¶ 2a (emphasis added).

tions, such as those associated with Coalition Joint Task Force—Mountain (CJTF—Mountain)<sup>60</sup> in Afghanistan, judge advocates must look to the “attendant circumstances” to determine NJP authority.<sup>61</sup>

### Identifying and Establishing Courts-Martial Convening Authorities

#### SITUATION:

*The Deputy SJA grabs you again as you are trying to figure out how the scanner that came with your rucksack deployable law office can scan text as a word document. She tells you that you will be glad you did the staff work to ensure solid jurisdictional chains when you “get over there.” She then recalls that task force commanders are generally vested only with special court-martial convening authority, and asks, “What are you going to do when you need a GCMCA? Are you going to mail packets back and forth across the ocean?” She then recommends that you look at what “they” did in Somalia to establish the JTF Commander as a GCMCA.<sup>62</sup>*

This section discusses who has the power to designate court-martial convening authorities, and how to ensure that a multi-service commander has maximum disciplinary flexibility; it argues that JTF commanders should be vested regularly with general courts-martial convening authority; and it closes with a discussion of the exercise of reciprocal court-martial jurisdiction in a joint environment. As at least one senior army judge advocate has noted, plans and orders are not legal authority for determining who may have courts-martial convening authority, or who can delegate or grant that authority:

Notwithstanding the statement of command relationships found in plans and orders, judge advocates must look to law and regulation to determine whether commanders are in fact courts-martial convening authorities. Judge advocates should read UCMJ Articles 22 through 24, and study [Rule for Courts-Martial (RCM) 201(e)], “Reciprocal Jurisdiction,” and the analysis thereto.<sup>63</sup>

#### Designation as a Court-Martial Convening Authority by the UCMJ

The UCMJ designates some commanders as court-martial convening authorities.<sup>64</sup> Other commanders may be given this authority either by delegation from a superior with the power to create subordinate convening authorities, or by defining the commander’s position as one in which the UCMJ vests such authority. Regarding multi-service units, Article 22, UCMJ, provides that “the commanding officer of a unified or specified combatant command” may convene general courts-martial.<sup>65</sup> Article 23, UCMJ, provides that “the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose” may convene special courts-martial.<sup>66</sup> Arguably, Article 23 grants any JTF commander or other multi-service unit commander special court-martial convening authority, without requiring any further action.<sup>67</sup>

While these UCMJ sections are fairly clear, the UCMJ provides no additional specific guidance regarding the level of court-martial convening authority given to joint-unit commanders. Standing alone, these sections create a broad gap of authority. The joint commanders of combatant commands have general court-martial convening authority; however, joint com-

60. Note that here the acronym CJTF uses “Coalition,” as opposed to “Combined,” to describe the JTF.

61. See generally AR 27-10, *supra* note 23, para. 3-8a(3). The CJTF-Mountain SJA used this exact technique to assist the command with NJP administration. Stone Interview, *supra* note 37.

If orders or directives do not expressly confer authority to administer non-judicial punishment to the commander of the unit with which the soldier is affiliated or present (as when, for example, they contain no provision attaching the soldier “for disciplinary purposes”), consider all attendant circumstances, such as—(a) The phraseology used in the orders. (b) Where the soldier slept, ate, was paid, performed duty, the duration of the status, and other similar factors.

AR 27-10, *supra* note 23, para. 3-8a(3).

62. See Berrigan, *supra* note 29, at 72; see also BALKANS OPERATIONS BOOK, *supra* note 5, at 172 (discussing several options used to structure general court-martial convening authority, but unfortunately, not commenting on their efficacy).

63. Warren, *supra* note 3, at 66.

64. UCMJ arts. 22-24 (2000) (stating who may convene general, special, and summary courts-martial, respectively).

65. *Id.* art. 22(a)(3).

66. *Id.* art. 23(a)(6).

67. Barto Interview, *supra* note 26.

manders below this level, regardless of rank, are limited to special court-martial convening authority, unless they are somehow otherwise vested with the authority to convene general courts-martial.<sup>68</sup> Other UCMJ provisions, which permit designation of GCMCAs, help fill in this gap.

### *Designation By Authority of the UCMJ*

#### *President*

The UCMJ specifically authorizes the President to designate any commanding officer as a GCMCA.<sup>69</sup>

#### *Secretary of Defense*

The President has authorized the Secretary of Defense (SECDEF) to empower any commanding officer of a joint command or joint task force to conduct general courts-martial.<sup>70</sup> During the deployment to Somalia, the SECDEF designated the JTF Commander as a GCMCA over all members of the JTF. This was accomplished only through the diligence and foresight of the Central Command SJA, who coordinated with the legal counsel for the Joint Chiefs of Staff to request general court-martial convening authority from the SECDEF.<sup>71</sup>

#### *Service Secretaries*

The “Secretary concerned” is given the authority to designate other “commanding officers,” “officers in charge of any other command,” or both, with court-martial convening author-

ity at whatever level is appropriate.<sup>72</sup> Not only does Article 22, UCMJ, list the SECDEF separately from “Secretary concerned” as one authorized to convene general courts-martial, indicating an intent to exclude the SECDEF from the meaning of “Secretary concerned” within the UCMJ, it also explicitly defines “Secretary concerned” to exclude the SECDEF.<sup>73</sup> This is important because, unlike a “Secretary concerned,” the UCMJ does not authorize the SECDEF to designate court-martial convening authorities.<sup>74</sup>

In a single-service environment, “the Secretary concerned” is much easier to determine than in multi-service units, in which arguably every Service Secretary involved is a “Secretary concerned.” At least one proposal has been made to clarify who qualifies as a “Secretary concerned” in a joint environment by defining the term as the Service Secretary of the service “of which the accused is a member.”<sup>75</sup> This suggestion, if followed, would reinforce a parochial application of justice, rather than reinforce the evolving joint nature of the armed forces. Every other paragraph within the UCMJ that describes who may convene a court-martial, at any particular level, focuses on the level of command or responsibility of the commander, not on the service of the accused.<sup>76</sup> Assuming that clarification is necessary, the better approach is to define “Secretary concerned” as the Service Secretary of which the *commander* is a member. Not only does this definition best reinforce unity of command, it also follows the basic logic that applies to the UCMJ sections as currently written; only the Service Secretary of the commander’s service should and would have the authority to so empower a commander.

68. *Army Regulation 27-10* further restricts SPCMCAs by prohibiting them from convening a court-martial empowered to adjudge a bad-conduct discharge—a punitive discharge—unless authorized to do so, in writing, by a superior GCMCA. AR 27-10, *supra* note 23, para. 5-25.

69. UCMJ art. 22 (a)(9). Article 22(a)(9) permits the President to designate “any other commanding officer” as a GCMCA. *Id.*

70. MCM, *supra* note 18, R.C.M. 201(e)(1)(B).

So much of the authority vested in the President under Article 22(a)(9) to empower any commanding officer of a joint command or joint task force to convene courts-martial is delegated to the Secretary of Defense, and such a commanding officer may convene general courts-martial for the trial of members of any of the armed forces.

*Id.*

71. Berrigan, *supra* note 29, at 72.

72. UCMJ arts. 22(a)(8), 23(a)(7), 24(a)(4). Article 22(a)(8) provides for GCMCA appointment of “any other commanding officer designated by the Secretary concerned.” *Id.* art. 22(a)(8). Article 23(a)(7) provides for SPCMCA appointment of “the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.” *Id.* art. 23(a)(7). Article 24(a)(4) provides for summary court-martial convening authority appointment of “the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.” *Id.* art. 24(a)(4).

73. MCM, *supra* note 18, R.C.M. 103 discussion (citing 10 U.S.C. § 101(8)).

74. See UCMJ arts. 22(a)(8), 23(a)(7), 24(a)(4).

75. Sokoloski Interview, *supra* note 22 (referring to PowerPoint slides and notes prepared by LtCol Mike Finnie, USMC, Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff (undated, but known to be from between 1999 and 2001) (on file with author)).

76. See UCMJ arts. 22(a)(8), 23(a)(7), 24(a)(4).

Articles 23(a)(1) and 24(a)(1), UCMJ, make it clear that combatant commanders may convene special or summary courts-martial because Article 22 specifically grants them with the authority to convene general courts-martial.<sup>77</sup> Whether their subordinate commanders have this same authority, however, is unclear. “[T]he UCMJ and *MCM* are not explicit as to the specific circumstances under which subordinate joint commanders have special court-martial convening authority.”<sup>78</sup> Combatant commanders do not have the authority to create subordinate GCMCA’s; however, they appear to have the authority, and do in fact exercise the authority, to designate certain subordinate joint commanders as Special Courts-Martial Convening Authorities (SPCMCA’s). Combatant commanders exercise this authority by designating a unit as “separate” under Article 23(a)(6), and by empowering the commander to try any member of the armed forces under RCM 201(e)(2)(c).<sup>79</sup> While this is a reasonable interpretation of these rules and is currently in use, some controversy still exists in this area of military justice.<sup>80</sup>

Deploying judge advocates should first determine if the UCMJ grants the task force commander either special or general courts-martial convening authority. If no specific provision applies to their commander under the given circumstances, judge advocates should next seek appointment of the commander as a SPCMCA by the combatant commander. The next step for judge advocates when supporting a multi-service unit, especially one designated as a JTF, is to request from a higher authority a grant for the commander to convene general courts-martial.<sup>81</sup> If the organization is deemed a “joint command” or “joint task force,” judge advocates should make this request through the SECDEF, as was done in Somalia.<sup>82</sup> If the unit is not so designated, then the request should go through the commander’s Service Secretary. The judge advocate community

has yet to incorporate these request provisions into its pre-deployment standing operating procedures (SOPs); however, they should be written into pre-deployment SOPs throughout the military services.

*Justification for Regularly Vesting Multi-Service Commanders with General Court-Martial Convening Authority*

As noted above, multi-service commanders are not automatically granted general court-martial convening authority. Although the President, SECDEF, and arguably the Service Secretaries have the power to vest multi-service commanders with this authority, it is not regularly done.<sup>83</sup> While designating multi-service commanders as GCMCA’s may not always be necessary, and multi-service commanders may not always exercise the authority if granted, the failure to make that designation appears time and again in deployments as a hindrance to the smooth operation of military justice.<sup>84</sup>

Some may argue that the recent increase in maximum punishment authority of SPCMCA’s from six months to one year<sup>85</sup> will increase the number of cases referred to special courts-martial and decrease the incentive for commanders to seek the authority to convene general courts-martial. While these projections may prove accurate, this does not diminish other arguments for regularly vesting multi-service commanders with general court-martial convening authority.

Army legal doctrine clearly indicates a preference for performing military justice functions as far forward in the area of operations as possible.<sup>86</sup> Vesting joint commanders with general court-martial convening authority is a cornerstone toward reaching this goal. Not only does it allow the exercise of this authority as far forward as possible, it also provides a basis for

77. JOINT PUB. 0-2, *supra* note 30, at IV-15a (construing UCMJ arts. 22(a)(8), 23(a)(7), 24(a)(4)).

78. Finnie Monograph, *supra* note 20, at 2.

79. *Id.*

80. The primary controversy over the authority of combatant commanders to designate subordinate court-martial convening authorities arises from the fact that the UCMJ prescribes court-martial authority and review following the individual service, rather than unified, chains of command. See UCMJ art. 23; *MCM*, *supra* note 18, R.C.M. 201(e), 504(b), 1111-1112. See generally Finnie Monograph, *supra* note 20.

81. Berrigan, *supra* note 29, at 118.

82. See *supra* notes 70-71 and accompanying text.

83. Berrigan, *supra* note 29, at 67-71.

84. See, e.g., HURRICANE MITCH BOOK, *supra* note 37, at 121. “The JTF commander during Hurricane Mitch was not designated as a General Courts-Martial Convening Authority. The only GCMCA for the operation was [the combatant commander for U.S. Southern Command].” *Id.* See also KOSOVO OPERATIONS BOOK, *supra* note 5, at 142 n.175.

85. *MCM*, *supra* note 18, R.C.M. 201(f)(2)(B) (as amended by Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 11, 2002)).

86. “Courts-martial will be conducted in the accused’s unit’s area of operations and as far forward in the unit’s area of operations as the commander deems appropriate.” FM 27-100, *supra* note 12, at 4-29.

unity of command in a joint environment. Probably of greater importance to the commander, such vesting provides him with maximum authority and flexibility to address military justice matters.

In addition to providing the commander with the foundational basics for the unity of command and military justice, vesting him with general court-martial convening authority impacts beyond justice matters. The power of a GCMCA is necessary for the administration of matters that fall outside of those which are purely military justice, to include complaints of wrongs by a commanding officer under Article 138 (assuming the appropriate predicate processing),<sup>87</sup> aviation accident investigations,<sup>88</sup> certain claims,<sup>89</sup> certain line of duty investigations,<sup>90</sup> and, in some limited circumstances, leaves and passes.<sup>91</sup> The provisions governing these fundamentally administrative actions are not written to empower a “commander” or an officer of a given rank; rather, they require action by court-martial convening authorities.<sup>92</sup> Thus, vesting joint commanders with general court-martial convening authority not only enables the command to process justice actions as far forward as possible, but also enables the command to complete a host of administrative actions that otherwise must be coordinated with rear echelons.

The default mode for a JTF should be to vest the JTF Commander with general court-martial convening authority.<sup>93</sup> As mentioned above, standard operating procedures in preparation for joint operations should be adapted to accomplish, or at least

guarantee, that proper requests are made to accomplish this authorization.

To best serve the commander who is not otherwise vested with general court-martial convening authority, judge advocates should begin every deployment into a joint environment by requesting either the Service Secretary or the SECDEF to grant the commander this authority. Judge advocates must coordinate the request through the judge advocate technical chain to either the Service Secretary’s legal advisor, the Chairman of the Joint Chiefs of Staff’s legal advisor, or both. If the request is denied, judge advocates should request that the GCMCA superior to the multi-service unit grant the commander the authority to convene special courts-martial with the power to adjudge a bad-conduct discharge. Absent such a request, unless the combatant command’s justice regulations specifically grant the commander this authority, it is withheld by Army regulation.<sup>94</sup>

#### *Reciprocal Court-Martial Jurisdiction and RCM 201(e)*

##### *SITUATION—CASE #1:*

*Joint Task Force BU has been deployed to a camp near the city of Tanjungpandan, located on the island of Belitung, one of the many islands that make up the Indonesian archipelago. The Indonesian government has welcomed the task force with open arms to help*

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87. UCMJ art. 138 (2000). Article 138, UCMJ, requires un-redressed complaints to be forwarded to “the officer exercising general court-martial jurisdiction over the officer against whom it is made.” *Id.* Colonel M. Tia Johnson, the Deputy SJA for JTF Guantanamo during 1991-92, noted an example of an Article 138 complaint filed during her deployment to Guantanamo. The appeal of a Naval noncommissioned officer’s (NCO’s) relief for cause was processed under Article 138 because the Naval NCO rating system did not contain an inherent administrative appeal process. Interview with then-Lieutenant Colonel M. Tia Johnson, Chair, International & Operational Law Department, The Judge Advocate General’s School, U.S. Army, in Charlottesville, Va. (Mar. 2, 2002). This example highlights both the administrative GCMCA function and fractured jurisdiction issues. Because of the perception of fractured jurisdiction, the NCO’s appeal was sent to four GCMCAs. *Id.* This “result” is not only inefficient, but also gives rise to the specter of a four-way split opinion.

88. U.S. DEP’T OF ARMY, REG. 385-40, ACCIDENT REPORTING AND RECORDS para. 1-9 (1 Nov. 1994).

89. U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS paras. 9-6(1)-(2) (1 Nov. 94). Special court-martial convening authorities may approve assessments up to \$5000 per incident. General court-martial convening authorities may approve assessments up to \$10,000 per incident. *Id.*; see also U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES ch. 9 (1 Apr. 1998); JAGMAN, *supra* note 23, § 0251; U.S. DEP’T OF NAVY, SEC’Y OF THE NAVY INSTR. 5890.1, ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES (17 Jan. 1991).

90. JAGMAN, *supra* note 23, § 0204d(2).

In the event of a major incident, however, the officer exercising general court-martial convening authority over the command involved, if a flag or general officer, or the first flag or general officer in the chain-of-command, or any superior flag or general officer in the chain-of-command, will immediately take cognizance over the case as the [convening authority].

*Id.* See also *id.* §§ 0209h, 0230b, 0231.

91. U.S. DEP’T OF ARMY, REG. 600-8-10, LEAVES AND PASSES para. 5-15(e) (1 July 1994).

92. See, e.g., JAGMAN, *supra* note 23, § 0204d(2).

93. Berrigan, *supra* note 29, at 121.

94. See AR 27-10 *supra* note 23, para. 5-25. See generally *United States v. Egan*, 53 M.J. 570, 580-81 (Army Ct. Crim. App. 2000) (deciding that the geographic combatant commander’s rules and regulations, as written, failed to overcome the Army regulatory restriction); MCM, *supra* note 18, R.C.M. 201(f)(2)(B), 1003(b)(8)(C).

*restore peace and stability to the region. After you have been in country for three weeks, with the operation going as planned, an Air Force staff sergeant assigned to the Joint Special Operations Task Force headquarters is accused of raping a local girl. One of the task force Air Force officers demands that the task force return the accused to his home unit so the Air Force can court-martial him.*<sup>95</sup>

Regardless of the characterization of a multi-service operation and the level of court-martial convening authority ultimately granted, joint commanders should not be afraid to exercise court-martial convening authority over members of all services within their command. Judge advocates should be prepared to advise joint commanders on the full range of military justice options. Sending a violator from a sister service home from a deployment for discipline is not always the best course of action, nor is it required.<sup>96</sup>

Article 17, UCMJ, gives each military service court-martial jurisdiction over members of the other services.<sup>97</sup> Rule for Courts-Martial 201(e), based upon Article 17, further lays out the basic framework for reciprocal court-martial jurisdiction among the services.<sup>98</sup> This rule identifies four explicit circumstances authorizing reciprocal jurisdiction: when a unified or specified combatant commander convenes the court-martial;<sup>99</sup> when a commander of a joint command or JTF vested with general court-martial convening authority by the SECDEF convenes the court-martial;<sup>100</sup> when a commander vested with special court-martial convening authority by a commander described in the two previous sections convenes the court-martial;<sup>101</sup> and when, regardless of the joint nature of the operation, the accused cannot be delivered to his parent service “without manifest injury to the armed forces.”<sup>102</sup>

When supporting a commander empowered to convene special courts-martial by a unified or specified combatant com-

mander or by a commander designated by the SECDEF, judge advocates should ensure that the superior command has prescribed regulations for convening such courts-martial.<sup>103</sup> Absent such regulations, the SPCMCA title is of little use under RCM 201(e). If the superior command has not prescribed such regulations, it is incumbent upon the forward deployed judge advocate to request them.<sup>104</sup>

What if the organization is joint, but the commander is not empowered to convene courts-martial under Article 22(a)(9) or under RCM 201(e)(2) as was the case in Task Force Falcon?<sup>105</sup> Alternately, what if the joint commander’s Service Secretary granted him court-martial convening authority, as proposed above?

Note first that a unit does not have to be labeled “joint” to fall under RCM 201(e)’s definition of “joint command” or “joint task force,” in stark contrast to the use and definition of these terms in joint publications.<sup>106</sup> Rule for Courts-Martial 103 defines “joint,” when “connect[ed] with military organizations, [as] connot[ing] activities, operations, organizations, and the like in which elements of more than one military service of the same nation participates.”<sup>107</sup> Under this definition, essentially any multi-service organization is “joint” for purposes of reciprocal jurisdiction under RCM 201(e).<sup>108</sup>

When the commander derives his court-martial convening authority from a source not specifically described in RCM 201(e), the “manifest injury” provision of RCM 201(e)(3)(B) is the best place for counsel to begin the argument for referring a case involving an accused from a sister service. “‘Manifest injury’ does not mean minor inconvenience or expense. Examples of manifest injury include direct and substantial effect on morale, discipline, or military operations, substantial expense or delay, or loss of essential witnesses.”<sup>109</sup> As joint operations become more common, the manifest injury to military justice caused by failing to take action as far forward as possible

95. Case #1 involves allegations of a crime that a convening authority would normally refer to a general, rather than special, court-martial. The discussion assumes that sovereign jurisdiction has been resolved in favor of the United States either by a status of forces agreement or other action or agreement by the host nation.

96. See generally Egan, 53 M.J. at 579-81.

97. UCMJ art. 17 (2000).

98. MCM, *supra* note 18, R.C.M. 201(e) analysis, app. 21, at A21-8 to -9.

99. *Id.* R.C.M. 201(e)(2)(A).

100. *Id.* R.C.M. 201(e)(2)(B).

101. *Id.* R.C.M. 201(e)(2)(C).

102. *Id.* R.C.M. 201(e)(3)(B).

103. See *id.* R.C.M. 201(e)(2)(C).

104. See *United States v. Egan*, 53 M.J. 570, 579 (Army Ct. Crim. App. 2000) (noting that military justice rules and regulations promulgated by a unified command, if properly written, may displace service-regulation rules and processing requirements).

105. See KOSOVO OPERATIONS BOOK, *supra* note 5, at 141.

becomes more obvious, and the argument for this exception will strengthen.

Although in practice the analysis probably stops with “manifest injury,” it should not. Joint commanders and judge advocates should not conclude that a court-martial convening authority cannot otherwise refer a case to court-martial. While noting the preference for a member of the same service as the accused to convene a court-martial, operational judge advocates should also note that a *preference* is not a *prohibition* to do otherwise.<sup>110</sup> Contrary to the limiting specificity of RCM 201(e)(2) and RCM 201(e)(3)(B), the closing sentence of RCM 201(e)(3) contains the following very permissive language, which seems to make the specific provisions unnecessary: “[h]owever, failure to comply with this policy does not affect an otherwise valid referral.”<sup>111</sup> Joint commanders can and should take advantage of this provision to refer appropriate cases to courts-martial.

Others have taken a narrower position on this issue:

The comments, however, make it clear that such reciprocal jurisdiction is not to be utilized outside of the joint environment. “The rule and its guidance effectuate the congressional intent that reciprocal jurisdiction ordinarily not be exercised outside of joint commands or task forces.” This guidance

often presents problems for multi-service operations that are not actual joint commands or task forces. Issues arise, for example, in joint training where a member of one service is assigned to a training position under the command of another service. The usual practice is simply to return the member to his home unit for appropriate discipline, but this can be costly and inefficient.<sup>112</sup>

The statement that “[t]his guidance often presents problems for multi-service operations” seems to ignore not only the plain language of RCM 201(e)(3) and its discussion, but also the evolution of joint operations.

Joint policy also indicates a preference for, but does not dictate, same-service disposition of cases.

Matters that involve more than one service or that occur outside a military reservation but within the jurisdiction of the JFC [Joint Force Commander] may be handled either by the JFC or by the Service component commander unless withheld by the JFC. . . . Matters that involve only one Service, and occurring on the military reservation or within the military jurisdiction of that Service component, normally should be handled

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106. Compare MCM, *supra* note 18, R.C.M. 201(e), with JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 223, 232 (12 Apr. 2001) [hereinafter JOINT PUB. 1-02]. Joint Publication 1-02 defines the terms joint force commander and joint task force as follows:

[J]oint force commander—A general term applied to a combatant commander, subunified commander, or joint task force commander authorized to exercise combatant command (command authority) or operational control over a joint force. Also called JFC.

....

[J]oint task force—A joint force that is constituted and so designated by the Secretary of Defense, a combatant commander, a subunified commander, or an existing joint task force commander. Also called JTF.

JOINT PUB. 1-02, *supra*, at 223, 232.

107. MCM, *supra* note 18, R.C.M. 103(13).

108. Note, however, that the MCM does not define the term “elements” used in its definition of “joint.” See *id.* R.C.M. 103 (definitions and rules of construction). Whether “elements” is meant only to refer to established units, to include provisional units, or to refer to individual service members, is unclear.

109. *Id.* R.C.M. 201(e) discussion.

110. See *id.* R.C.M. 201(e)(3). See generally *United States v. Egan*, 53 M.J. 570, 578-81 (Army Ct. Crim. App. 2000).

111. MCM, *supra* note 18, R.C.M. 201(e)(3). The analysis to this section states that

[RCM 201(e)] adds a clarification at the end of subsection (3) that a court-martial convened by a commander of a service different from the accused’s is not jurisdictionally defective nor is the service of which the convening authority is a member an issue in which the accused has a recognized interest.

*Id.* R.C.M. 201(e)(3) analysis, app. 21, at A21-8.

112. Major Grant Blowers, *Disciplining the Force—Jurisdictional Issues in the Joint and Total Force*, 42 A.F. L. REV. 1, 12 n.67 (1997) (quoting MCM, *supra* note 18, R.C.M. 201, cmt. (e)).

by the Service component commander, subject to Service regulations.<sup>113</sup>

## Nonjudicial Punishment Authority

### Primary Jurisdiction

Note, however, that the use of the word “normally” recognizes that even in single-service violations, joint commanders have the ultimate decision as to whether they, or a service component commander, will administer NJP in any given circumstance.<sup>114</sup>

### Administration of Nonjudicial Punishment

#### SITUATION—CASE #2:

*The Chief of Staff catches you in the chow hall at breakfast and tells you to be in the General's office in thirty minutes to brief “the old man” on his options for dealing with “the four clowns they caught downtown last night.” Having no idea what he is talking about and trying to avoid the “deer in the headlights look,” you respond, “Roger, Sir. Thirty minutes.” You quickly leave the chow hall and discover that an Army specialist was caught drinking with a senior airman, a Marine corporal, and a Navy petty officer third class (all E-4s). Having drafted General Order #1 for BG Phightshard's signature, you are well aware that consuming alcohol is a violation of the order.*

More often than not, breaches of discipline, such as described in the above scenario, are dealt with most appropriately at the Article 15 level. Given that these four individuals are the same grade and committed the same or similar misconduct, the commander's first inclination probably is to treat all four similarly. This proposition becomes difficult, however, as one explores the applicable NJP regulations. This section discusses the authority to conduct NJP within a multi-service organization, discusses which regulations to apply, compares and contrasts key features of military service NJP regulations, and closes with a discussion of how to address differences among these regulations.

Authority to impose NJP is a function of command. *Joint Publication (JP) 0-2* states that “[t]he JFC may impose nonjudicial punishment upon any military personnel of the command, unless such authority is limited or withheld by a superior commander.”<sup>115</sup> The joint publication definition of JFC includes JTF commanders given command authority.<sup>116</sup> Assuming that a superior commander has not withheld NJP authority, JTF commanders may impose NJP on offending service members who are “of the command.”<sup>117</sup>

Commanders of multi-service organizations not meeting the definition of “Joint Force” in *JP 1-02, Department of Defense Dictionary of Military and Associated Terms*, may still have NJP authority over members of their command regardless of service. Article 15, UCMJ, permits a commander to impose NJP upon “officers of his command [and] other personnel of his command.”<sup>118</sup> Article 15 does not define the phrase “of his command,” but it is defined within service regulations. All three services define “of the command” in a fairly similar manner.<sup>119</sup> Unlike the status definitions required for court-martial convening authorities,<sup>120</sup> all three services define “command” functionally for Article 15 purposes.<sup>121</sup> As discussed previously, in establishing jurisdiction, the clearest indication that a service member is “of the command” is the order assigning him to a unit or the order assigning the unit to its higher command. Absent these orders, judge advocates may look to the “attendant circumstances” to determine if the service member is sufficiently associated with the command to warrant exercise of NJP authority.<sup>122</sup> Although neither the Navy's *Manual of the Judge Advocate General (Navy Manual, or JAGMAN)* nor the Air Force Instruction (AFI) on NJP, *AFI 51-202*, specifically uses the term “attendant circumstances,” both fairly embrace the concept.<sup>123</sup>

113. JOINT PUB. 0-2, *supra* note 30, at V-21.

114. See Egan, 53 M.J. at 578 (noting in dicta that the EUCOM directive, mirroring language found in *Joint Publication 0-2*, did not prohibit referral of charges by another service).

115. JOINT PUB. 0-2, *supra* note 30, at V-21.

116. JOINT PUB. 1-02, *supra* note 106, at 223.

117. UCMJ art. 15(b) (2000).

118. *Id.* art. 15(b)(2).

119. Compare AR 27-10, *supra* note 23, para. 3-8, with JAGMAN, *supra* note 23, § 0107a(1), and AFI 51-202, *supra* note 23, paras. 2.3, 2.3.1.

120. See UCMJ arts. 22-24.

121. JAGMAN, *supra* note 23, § 0107a(1); AFI 51-202, *supra* note 23, para. 2.3.1; AR 27-10, *supra* note 23, para. 3-7.

122. AR 27-10, *supra* note 23, para. 3-8a(3). See *supra* note 61 (stating this provision).

A sub-issue to the determination of whether a service member is “of the command” in a multi-service organization is concurrent jurisdiction. Both the *Navy Manual* and *AFI 51-202* recognize that, under certain circumstances, a service member may be concurrently subject to the NJP authority of more than one commander who are not part of the same chain of command.<sup>124</sup> Although *AR 27-10* does not specifically address concurrent NJP jurisdiction, its definition of “of the command” leaves this possibility open. The *Navy Manual* and *AFI 51-202* both use the example of a service member’s parent and host units having concurrent NJP authority when a service member is attached to another unit for temporary duty. Thus, it is possible for commanders of different services to have NJP authority simultaneously over a service member. While a commander is not required to coordinate with or provide notification to another commander with whom he shares NJP jurisdiction, commanders should do so to avoid the possibility of the other chain of command dismantling the NJP administratively.

For quite some time, Army and Naval regulations have recognized the authority of other services over their members when they are assigned to multi-service organizations. These regulations designate the authority to administer NJP very broadly. Rather than limiting NJP authority to joint, unified, or JTF commanders as *JP 1-02* defines them, *AR 27-10* and the *Navy Manual* use the more inclusive term “multi-service” commander.<sup>125</sup> By using this broad term, these regulations authorize multi-service unit commanders to exercise NJP authority over Army and Naval service members “of the command” in the multi-service units, even though the unit does not meet *JP 1-02*’s definition of joint command, unified command, or JTF.

Recent changes to *AFI 51-202* expanded the Air Force’s definition of “commander.”<sup>126</sup> Until this change, the definition included only Air Force officers, and it arguably precluded commanders of other services from exercising NJP authority over Air Force members unless those members were assigned

123. See JAGMAN, *supra* note 23, § 0107(a)(1); AFI 51-202, *supra* note 23, para. 2.3.1. The JAGMAN uses the terms “of the command” and “of the unit” to describe the required command relationship, and states simply, “A member is ‘of the command,’ or ‘of the unit,’ if assigned or attached thereto.” JAGMAN, *supra* note 23, § 0107(a)(1). *Air Force Instruction 51-202* uses the term “members of their command” analogously to “of the command,” and states that “a member need not be attached on TDY [temporary duty] orders for the commander to exercise NJP authority if the commander exercises the usual responsibilities of command over the member.” AFI 51-202, *supra* note 23, para. 2.3.1.

124. See JAGMAN, *supra* note 23, § 0107(a)(1); AFI 51-202, *supra* note 23, para. 2.3.1. Section 0107(a)(1) of the *Navy Manual* states that

[a] member may be “of the command,” or “of the unit,” of more than one command or unit at the same time and, consequently, be subject to the nonjudicial punishment authority of both commanders. For example, members assigned to or attached to commands or units for the purpose of performing temporary duty (TDY) are subject to the nonjudicial punishment authority of the commanders of both the parent and TDY commands. Similarly, members assigned or attached to a detachment under the operational control of another command or unit by virtue of operational orders, or other authorized means, are subject to the nonjudicial punishment authority of the commanders of both the parent and supported units.

JAGMAN, *supra* note 23, § 0107(a)(1). *Air Force Instruction 51-202* states that

[a] member need not be attached on TDY orders for the commander to exercise NJP authority if the commander exercises the usual responsibilities of command over the member. A TDY commander has concurrent authority with the commander of the member’s element or organization of permanent assignment.

AFI 51-202, *supra* note 23, para. 2.3.1.

125. Compare *AR 27-10*, *supra* note 23, para. 3-7b, and JAGMAN, *supra* note 23, § 106d, with *JOINT PUB. 1-02*, *supra* note 106, at 223, 232. *Army Regulation 27-10* states that

[a] multi-service commander or officer in charge, to whose command members of the Army are assigned or attached, may impose nonjudicial punishment upon such soldiers. A multi-service commander or officer in charge, alternatively, may designate one or more Army units, and shall for each such Army unit designate an Army commissioned or warrant officer as commanding officer for the administration of discipline under Article 15, UCMJ . . . . A multi-service commander or officer in charge, when imposing nonjudicial punishment upon a military member of their command, shall apply the provisions of this regulation.

*AR 27-10*, *supra* note 23, para. 3-7b. Section 106(d) of the *Navy Manual* states that

[a] multi-service commander or officer in charge to whose staff, command or unit members of the naval service are assigned may impose nonjudicial punishment upon such individuals. A multi-service commander, alternatively, may designate one or more naval units, and shall for each such naval unit designate a commissioned officer of the naval service as commanding officer for the administration of discipline under article 15, UCMJ. A copy of any such designation by the commander of a multi-service command shall be furnished to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, and to the Judge Advocate General.

JAGMAN, *supra* note 23, § 106d.

126. See AFI 51-202, *supra* note 23, para. 2.2.

to a joint or unified billet.<sup>127</sup> The revised Air Force definition of commander includes both “joint force commanders” and “multi-service commanders in combined commands, combined task forces and activities outside the Air Force.”<sup>128</sup> The use of the term “multi-service commander” overtly recognizes non-Air Force commanders’ NJP authority over Air Force members.<sup>129</sup> In addition, *AFI 51-202* expansively defines the phrase “activities outside the Air Force” to include, apparently, even very small units to which Air Force personnel are attached or assigned.<sup>130</sup> To ensure NJP coverage for Air Force members, *AFI 51-202* gives the 11th Wing Commander, Bolling AFB, Washington D.C., concurrent jurisdiction over Air Force personnel assigned to any “activity outside the Air Force.”<sup>131</sup> The AFI also reminds multi-service commanders to ensure that they have “command authority” over any offending member of the Air Force before they initiate NJP.<sup>132</sup> Although *AFI 51-202* does not define “command authority,” the context implies and the intent when written was synonymous use with the phrase “of the command.”<sup>133</sup>

### *Applicable NJP Regulation*

Presuming a service member is “of the command” for NJP, the next issue is what regulations or guidance on NJP applies in

a joint setting. The UCMJ and *MCM* are joint by their very nature. Article 15, UCMJ, and *MCM*, Part V, apply to all service members.<sup>134</sup> Beyond this guidance, however, no joint NJP regulations exist.

The UCMJ and *MCM* both allow the Service Secretaries to promulgate regulations that limit or implement their NJP provisions.<sup>135</sup> With this authority, the Secretaries have implemented such regulations, with some striking differences. This challenges judge advocates supporting multi-service operations to become sufficiently familiar with the other services’ regulations to advise their joint commanders appropriately and to administer NJP properly.

To help resolve the issue of what NJP rules apply in a joint setting, the Army and Air Force regulations echo *JP 0-2*’s guidance by requiring application of “the regulations of the offender’s Service when conducting [NJP] proceedings, including punishment, suspension, mitigation, and filing.”<sup>136</sup> The Navy is silent on this point; however, one reaches the same conclusion following the guidance in *JP 0-2*.

As mentioned earlier, commanders can address NJP in a joint setting simply by returning violators home to their units. Although a weak approach from a standpoint of unit discipline,

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127. See U.S. DEP’T OF AIR FORCE, INSTR. 51-202 NONJUDICIAL PUNISHMENT para. 2.2 (1 Oct. 1996) [hereinafter *AFI 51-202*, 1996 edition], available at <http://afpubs.hq.af.mil/pubfiles/af/51/afi51-202.pdf>. Although the 1996 edition of *AFI 51-202* did not define joint commander specifically, one could derive an exclusionary definition from the context of its use. As seen below, the section was entitled “NJP Authority in Joint or Unified Commands,” and the language used in the section mirrors that found in *JP 1-02*. In addition, the manner the 1996 edition of *AFI 51-202* used the term “joint or unified commander” appeared to contemplate only *JP 1-02*’s use of the terms, thereby excluding commanders of multi-service units not specifically characterized as joint or unified. Cf. *JOINT PUB. 1-02*, *supra* note 106, at 223, 232. The following is the previous AFI language:

NJP Authority in Joint or Unified Commands. The commander of a joint command, unified command, or joint task force is responsible for discipline in the command. The joint or unified commander should normally exercise disciplinary authority through the Air Force component commander or the SAFO [senior Air Force officer] to the extent practicable. The joint or unified commander may impose NJP on Air Force members of that command, regardless of the commander’s parent service, unless such authority is withheld by a superior commander. The joint or unified commander will follow this instruction when imposing nonjudicial punishment on Air Force members. Matters that involve more than one service or that occur outside a military reservation but within the joint or unified commander’s jurisdiction may be handled by the joint or unified commander, the Air Force component commander, or the SAFO, unless withheld by the joint or unified commander. Matters that involve only one service, and occurring on a military reservation or within the military jurisdiction of the Air Force, normally should be handled by the Air Force component commander or the SAFO, subject to this instruction. [See *JOINT PUB. 0-2*, *supra* note 30]. When NJP appears warranted, the joint commander coordinates with the SAFO or commander of the appropriate Air Force element before taking action. If the joint commander decides not to take action, but NJP still appears warranted, the SAFO or Air Force element commander takes action. If the joint commander decides to impose NJP, the SAFO or commander of the element immediately notifies the servicing Air Force [SJA].

*AFI 51-202*, 1996 edition, *supra*, para. 2.2.

128. *AFI 51-202*, *supra* note 23, paras. 2.2.9 to .10.

129. See *id.* para. 2.2.10 (“The multi-service commander must be an officer in the U.S. Armed Forces.”).

130. *Id.* attch. 1 (Glossary of References and Supporting Information).

131. *Id.* para. 2.2.6.

132. *Id.* para. 2.6.

133. Telephone Interview with Major Dave Kendrick, Chief of Policy & Precedents, Air Force Legal Services Agency, Military Justice Section (May 7, 2002).

134. See generally UCMJ art. 15 (2000); *MCM*, *supra* note 18, pt. V (describing NJP procedures).

135. See UCMJ art. 15(a); *MCM*, *supra* note 18, pt. V, ¶ 2a.

the benefit to this approach is case management, especially during short-term deployments that stretch time and resources to their limits. While easy to administer, this approach has several problems. First, it simply shuffles a problem onto someone else's desk. As the length of a deployment increases, this approach becomes less appealing. Second, returning problem soldiers to garrison may incite morale or discipline problems as troops quickly learn that committing a minor disciplinary infraction may be a ticket home.<sup>137</sup> Another obvious problem with this approach is that as the distance from the offender and the situs of his crime or disciplinary infraction increases, the more problematic it becomes to prove the case. The cost/benefit analysis undertaken by commanders in garrison may lead them to not take action. Unfortunately, this approach seems to be a common solution.

An alternate approach is to allow the offender's service to administer NJP. This can be done by authorizing service component commanders to administer NJP to members of their service regardless of where those members are assigned. The benefit to this approach is that it helps ensure expertise in the application of service regulations, which minimizes the potential for administrative errors that may later affect the Article 15.

*Joint Publication 0-2* and all of the service regulations have provisions for allowing a senior member of a service in a multi-service unit to exercise administrative and NJP authority over members of their respective service.<sup>138</sup> *Joint Publication 0-2* states that "a combatant commander may prescribe procedures by which a senior officer of a Service assigned to the headquar-

ters element of a joint organization may exercise administrative and nonjudicial punishment authority over personnel of the same Service."<sup>139</sup> *Air Force Instruction 51-202* addresses this issue by defining the "senior Air Force officer in the headquarters staff organization of a unified command, subordinate unified command, joint task force, combined command, or combined task force [or activity outside the Air Force]" as a commander, regardless of whether they actually occupy a command billet.<sup>140</sup> As mentioned above, *AR 27-10* and the *Navy Manual* allow multi-service commanders to designate a senior Army or Naval officer, respectively, for administration of NJP to members of their service within the command, as long as certain notice provisions are met.<sup>141</sup> *Air Force Instruction 51-202* also recognizes this authority, but has no notice requirement.<sup>142</sup>

Finally, a multi-service commander may choose to process the NJP action within the service member's operational chain of command. The servicing judge advocate and their staff need to apply the service member's own regulation to process these NJP actions properly. Only one service regulation mandates that the multi-service commander consult with a servicing SJA. *Air Force Instruction 51-202* requires a multi-service commander to coordinate with the servicing Air Force SJA when the commander is considering an Air Force member for NJP. The practical reason for this consultation is to ensure that the commander understands Air Force policies and NJP procedures.<sup>143</sup> Although not required by Army and Naval regulations, all judge advocates should coordinate with sister service judge advocates when undertaking cross-service NJP.

136. JOINT PUB. 0-2, *supra* note 30, at V-21. Cf. AR 27-10, *supra* note 23, paras. 3-7b, 3-8c; AFI 51-202, *supra* note 23, para. 2.4.2. *Army Regulation 27-10* states that

[a] multi-service commander or officer in charge, when imposing nonjudicial punishment upon a military member of their command, shall apply the provisions of this regulation. . . . Other provisions of [AR 27-10] notwithstanding, an Army commander may impose punishment upon a member of another service only under the circumstances, and according to the procedures prescribed by the member's parent service.

AR 27-10, *supra* note 23, paras. 3-7b, 3-8c.

137. Blowers, *supra* note 112, at 12 n.67.

138. See JOINT PUB. 0-2, *supra* note 30, at V-20; AR 27-10, *supra* note 23, para. 3-7b; JAGMAN, *supra* note 23, § 0106d; AFI 51-202, *supra* note 23, para. 2.2.5.

139. JOINT PUB. 0-2, *supra* note 30, at V-20.

140. AFI 51-202, *supra* note 23, para. 2.2.5.

141. See AR 27-10, *supra* note 23, para. 3-7b; JAGMAN, *supra* note 23, § 0106d. *Army Regulation 27-10* states that

[a] multi-service commander or officer in charge, alternatively, may designate one or more Army units, and shall for each such Army unit designate an Army commissioned or warrant officer as commanding officer for the administration of discipline under Article 15, UCMJ. A copy of such designation shall be furnished to Criminal Law Division, The Judge Advocate General . . . .

AR 27-10, *supra* note 23, para. 3-7b. Section 0106d of the *Navy Manual* states that

[a] multi-service commander, alternatively, may designate one or more naval units, and shall for each such naval unit designate a commissioned officer of the naval service as commanding officer for the administration of discipline under article 15, UCMJ. A copy of any such designation by the commander of a multi-service command shall be furnished to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, and to the Judge Advocate General.

JAGMAN, *supra* note 23, § 0106d.

142. AFI 51-202, *supra* note 23, paras. 2.7-2.7.2 (requiring only the filing of the original delegation letter with the servicing SJA).

Part of determining how to process an incident of minor misconduct in a joint environment is the overarching problem of how to achieve an atmosphere of equity. As indicated above, commanders must apply the service regulation of the accused, and these regulations approach NJP differently. To ensure that multi-service commanders understand that blind application of a member's regulation can lead to disparate results, judge advocates should advise these commanders of the differences among the service regulations.

### Standard of Proof

The standard of proof required is the most fundamental difference among Army, Navy, and Air Force NJP regulations. The *Navy Manual* requires proof by a preponderance of the evidence, while *AR 27-10* requires, and *AFI 51-202* appears to require, proof beyond a reasonable doubt.<sup>144</sup> Neither standard is wrong; however, this variance highlights a fundamental difference in the services' philosophical approach to NJP. The Army and Air Force base their standard upon the potential for the action to end up at court-martial, while the Navy bases its standard upon the fact that NJP is administrative in nature. This difference affects how commanders from the different services approach and use NJP. It also affects how members of the different services perceive NJP. Commanders must be cognizant

of this basic difference when considering NJP for members of another service.

### Right to Counsel

Another difference among regulations is the treatment accorded an alleged offender's right to counsel. In contrast to the Army and Air Force, the Navy and Marine Corps do not recognize a right to legal advice by counsel before Article 15 proceedings.<sup>145</sup> Note, however, that the *Navy Manual* does not permit the entry of an NJP result into a service record unless the service member was given the opportunity to consult with counsel or waived that right in writing.<sup>146</sup> Consultation with counsel before the imposition of NJP on a Naval service member involves only a basic explanation of rights, and it does not include advice on the merits of the action.<sup>147</sup> Again, neither approach is wrong; rather, this variance reflects the services' differing philosophical approaches to this administrative disciplinary function.

Additionally, *AFI 51-202* addresses requests for individual military counsel (IMC) in the NJP setting. Although it creates no right to an IMC, the instruction creates a processing requirement if the Air Force member asserts an attorney-client relationship with a military defense counsel other than his detailed military defense counsel. While this does not create a disparate treatment issue, such requests from airmen must be processed in accordance with *AFI 51-202*.<sup>148</sup>

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143. See *id.* paras. 2.5.1, 2.6.

144. Compare JAGMAN, *supra* note 23, § 0110b ("[The] standard of proof by which facts must be established at mast or office hours is a 'preponderance of the evidence,' rather than 'beyond a reasonable doubt,' as it is at courts-martial."), with *AR 27-10*, *supra* note 23, para. 3-181 ("Punishment will not be imposed unless the commander is convinced beyond a reasonable doubt . . . that the soldier committed the offense(s)."), and *AFI 51-202*, *supra* note 23, para. 3-4. The AFI states:

While no specific standard of proof applies to NJP proceedings . . . an alleged offender is entitled to demand trial by court-martial, in which case proof beyond a reasonable doubt of each element of every offense by legal and competent evidence is a prerequisite to conviction. . . . If such proof is lacking, NJP action is usually not warranted.

*AFI 51-202*, *supra* note 23, para. 3-4.

145. Compare *AR 27-10*, *supra* note 23, para. 3-18c ("The soldier will be informed of the right to consult with counsel and the location of counsel."); and *AFI 51-202*, *supra* note 23, para. 3.12.2, with JAGMAN, *supra* note 23, § 0109a. The *Navy Manual* states:

There is no right for an accused to consult with counsel prior to nonjudicial punishment; however, commanding officers are encouraged to permit accused to so consult . . . . Failure to provide the opportunity for an accused to consult with counsel prior to nonjudicial punishment does not preclude the imposition of nonjudicial punishment; it merely precludes the admissibility of the record of nonjudicial punishment in aggravation at a later court-martial . . . .

JAGMAN, *supra* note 23, § 0109a (emphasis added).

146. JAGMAN, *supra* note 23, § 0109e(1). Note that JAGMAN appendix A-1-d can be used to record NJP proceedings. See generally *id.* app. A-1-d.

147. *Id.* § 0109d(2).

Such advice to an accused from a military lawyer shall be limited to an explanation of the legal ramifications involved in the right to refuse captain's mast/office hours. These legal ramifications are limited to areas such as: the accused's substantive and procedural rights at a court-martial as opposed to captain's mast/office hours; the respective punishment limitations; and the potential uses of courts-martial convictions and captain's mast/office hours records at any subsequent trial by court-martial.

*Id.*

## *Right to Demand Trial by Court-Martial*

The *Navy Manual* states that “[a] person in the Navy or Marine Corps who is attached to or embarked in a vessel does not have the right to demand trial by court-martial in lieu of nonjudicial punishment.”<sup>149</sup> Although this provision indicates that only Naval and Marine personnel lose the right to demand trial by court-martial when embarked, Article 15 itself makes no such distinction.<sup>150</sup> No member of any service may demand trial by court-martial in lieu of NJP while embarked in a vessel, regardless of the service of the officer offering the NJP. Surprisingly, *AR 27-10* makes note of this provision of Article 15,<sup>151</sup> while *AFI 51-202* is silent on this issue. Even if a service regulation contradicted this provision, the UCMJ, enacted by Congress, would take precedence.

## *Punishment*

In addition to these procedural differences, each Service Secretary has taken advantage of their authority to further limit the “kind and amount of punishment authorized” by Article 15.<sup>152</sup> Appendix A to this article presents the *MCM*’s punishment limitations<sup>153</sup> in a chart format. Appendices B-D chart the punishment limitations found in service regulations,<sup>154</sup> discussed below.

## *UCMJ Article 15 Restrictions on Punishment*

Article 15 itself sets up the basic split in punishment authority over enlisted members between company-grade and field-grade commanding officers. Army and Naval regulations retain this split in authority,<sup>155</sup> while the Air Force divides it fur-

ther. The Air Force distinguishes commanders in the rank of major from higher-ranking officers to address specifically their ability to reduce enlisted soldiers.<sup>156</sup> Officers in charge (OICs) may also have Article 15 punishment authority, up to the maximum allowed for a company-grade commander, if their Service Secretary has provided them with this authority under service regulations.<sup>157</sup>

The maximum punishment authority established in Article 15 and the *MCM* for company-grade commanders is a reprimand, confinement on bread and water for three days (if attached to or embarked in a vessel), seven days’ correctional custody, fourteen days’ restriction, fourteen days’ extra duty, forfeiture of seven days’ pay, reduction in rank of one pay grade—if within the imposing officer’s promotion authority, and detention of pay<sup>158</sup> for fourteen days.<sup>159</sup> Article 15 gives field-grade and general officers greater punishment authority, but limits them to imposing a reprimand, confinement on bread and water for three days (if attached to or embarked in a vessel), thirty days’ correctional custody, forty-five days’ restriction, forty-five days’ extra duty, forfeiture of thirty days’ pay, reduction in rank to the lowest enlisted pay grade—if within the imposing officer’s promotion authority (enlisted members, E-5 and above, however, may not be reduced more than one pay grade), and detention of one-half pay for three months.<sup>160</sup>

## *Summarized Article 15*

The Army is the only service that includes within its regulations the very limited form of NJP called a “summarized” Article 15.<sup>161</sup> Summarized Article 15s are recorded on a form different from those used with formal Article 15s,<sup>162</sup> and the

148. See *AFI 51-202*, *supra* note 23, para. 3.12.2.

149. *JAGMAN*, *supra* note 23, § 0108c.

150. See UCMJ art. 15 (2000). “However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment.” *Id.* (emphasis added).

151. See *AR 27-10*, *supra* note 23, para. 3-18d.

152. UCMJ art. 15(a).

153. See *MCM*, *supra* note 18, pt. V, ¶ 5; UCMJ art. 15.

154. See *AR 27-10*, *supra* note 23, tbl. 3-1; *AFI 51-202*, *supra* note 23, tbls. 3.1-3.2; BRENT G. FILBERT & ALAN G. KAUFMAN, *NAVAL LAW—JUSTICE AND PROCEDURE IN THE SEA SERVICES* 66 (3d ed. 1998). See generally *AR 27-10*, *supra* note 23, ch. 3; *JAGMAN*, *supra* note 23, § 0111; *AFI 51-202*, *supra* note 23, para. 3.17.

155. See *AR 27-10*, *supra* note 23, para. 3-19 and tbl. 3-1; *JAGMAN*, *supra* note 23, § 0111.

156. *AFI 51-202*, *supra* note 23, tbl. 3.1.

157. UCMJ art. 15(c).

158. Although authorized by Article 15 and the *MCM*, see, e.g., *id.* art. 15(b)(2), none of the service regulations have provisions for the detention of pay.

159. *Id.* art. 15(b)(2); *MCM*, *supra* note 18, pt. V, ¶ 5.

160. UCMJ art. 15(b)(2)(H).

maximum punishment a commander can impose is a reprimand, fourteen days' restriction, and fourteen days' extra duty. In addition, *AR 27-10* designs summarized Article 15s as purely local actions, with no means of filing the documentation in a service member's official records. Because of the limited nature of the punishment, service members offered summarized Article 15 procedures have no right to advice of counsel.<sup>163</sup>

*Confinement on Bread and Water (if Attached to or Embarked in a Vessel)*

Although Article 15 and the *MCM* do not place rank restrictions on the punishment of confinement on bread and water, each military service does restrict the use of this punishment. Both the Navy and Army limit confinement on bread and water to grades E-3 and below, whereas the Air Force disallows the punishment altogether.<sup>164</sup> An Army Ranger, private first class, involved in some minor misconduct while living aboard an aircraft carrier that his company was using as a staging base, might be surprised to discover that if subjected to NJP proceedings, he could not demand trial by court-martial,<sup>165</sup> and either the Ranger company commander or the ship's captain could confine him on bread and water for up to three days.<sup>166</sup>

*Correctional Custody, Restriction, and Extra Duty*

None of the services further limit the maximum duration of correctional custody commanders and OICs may impose;<sup>167</sup> however, the Army and Navy have emplaced restrictions based

upon the rank of the offender. Army and Naval regulations only permit correctional custody of service members in grades E-3 or below, or of those that have an unsuspended reduction to E-3 or below.<sup>168</sup> The Air Force does not have a similar rank or grade limitation.

None of the services further limit the maximum punishment under the *MCM* that commanders and OICs may impose for restriction to limits with or without suspension of duty. Therefore, company-grade commanders and OICs may impose up to fourteen days, and commanders in grades O-4 and above may impose up to sixty days, of either form of restriction.<sup>169</sup>

Neither the Army nor Air Force impose hour limitations on the performance of extra duty, but with recent changes to *AFI 51-202*, both now limit the type of extra duty service members may perform.<sup>170</sup> The Navy and Marine Corps have the most restrictive extra duty limitations: no extra duty on Sunday, and "normally" limiting extra duty to two hours per day.<sup>171</sup>

*Reduction in Rate or Grade*

The *Navy Manual* appears to give all commanders, regardless of rank, the same general reduction authority;<sup>172</sup> however, other sources limit the reduction authority of commanding officers to ranks within their promotional authority.<sup>173</sup> In addition, commanders cannot reduce Navy enlisted members in grades E-7 and above and Marine Corps enlisted members in grades E-6 and above at Article 15 proceedings. The major difference is that, unlike the other services, the *Navy Manual* only permits a reduction of one grade, regardless of the offender's

161. See generally *AR 27-10*, *supra* note 23, para. 3-16.

162. The Army uses Department of the Army (DA) Form 2627 to record formal Article 15 proceedings, and uses DA Form 2627-1 to record summarized Article 15 proceedings. See U.S. Dep't of Army, DA Form 2627, Record of Proceedings Under Article 15, UCMJ (Aug. 1984); U.S. Dep't of Army, DA Form 2627-1, Summarized Record of Proceedings Under Article 15, UCMJ (Aug. 1984).

163. *AR 27-10*, *supra* note 23, para. 3-16c(2).

164. Compare *id.* para. 3-19b(2), and JAGMAN, *supra* note 23, § 0111c, with *AFI 51-202*, *supra* note 23, tbl. 3.1 n.3.

165. UCMJ art. 15(a).

166. See *AR 27-10*, *supra* note 23, para. 3-19b(2).

167. Company-grade commanders and OICs may impose up to seven days, and commanders in grades O-4 and above may impose up to thirty days' correctional custody. *MCM*, *supra* note 18, pt. V, ¶ 5.

168. *AR 27-10*, *supra* note 23, para. 3-19b(1); JAGMAN, *supra* note 23, § 0111b.

169. *MCM*, *supra* note 18, pt. V, ¶ 5.

170. See *AR 27-10*, *supra* note 23, para. 3-19b(5); *AFI 51-202*, *supra* note 23, para. 3.17.4.

171. JAGMAN, *supra* note 23, § 0111d.

172. *Id.* § 0111e.

173. See U.S. DEP'T OF NAVY, NAVAL PERSONNEL MANUAL art. 1450-010 (Jan. 2002), available at [https://buperscd.technology.navy.mil/bup\\_updt/upd\\_CD/BUPERS/MILPERS/Milpers.pdf](https://buperscd.technology.navy.mil/bup_updt/upd_CD/BUPERS/MILPERS/Milpers.pdf); U.S. MARINE CORPS, ORDER P1400.32C, MARINE CORPS PROMOTION MANUAL, vol. 2, Enlisted Promotions paras. 1200, 7001 (30 Oct. 2000), available at <http://www.usmc.mil/directiv.nsf>.

grade.<sup>174</sup> Both Army and Air Force regulations permit field-grade commanders and OICs to reduce enlisted members, grades E-4 and below, by more than one grade.<sup>175</sup>

*Army Regulation 27-10* permits company-grade commanding officers to reduce by one grade any service member holding an enlisted rank within the commanding officer's general promotion authority.<sup>176</sup> On the other hand, Army regulations restrict officers in the field from reducing enlisted members in grades E-7 and above because these members are not within their promotion authority.<sup>177</sup>

Air Force Instructions generally do not tie reduction authority to promotion authority. *Air Force Instruction 51-202* limits the reduction authority of company-grade commanders to grades E-5 and below. The instruction also limits the reduction authority of field-grade officers: commanders in the rank of major may reduce grades E-6 and below, and commanders in the rank of lieutenant colonel or above may reduce grades E-7 and below. Only the Air Force permits reduction of enlisted members in grades E-8 and E-9. While denying Article 15 authority over those in grades E-8 and E-9 to commanders below the rank of lieutenant colonel, *AFI 51-202* permits commanders of major commands, combatant commanders, and officers delegated with the corresponding promotion authority to reduce these senior enlisted grades.<sup>178</sup>

An important point for commanders of multi-service units in exercising NJP authority is that the reduction in grade authority refers to the commander's authority to promote others of similar rank, not necessarily their authority to promote the individual being subjected to NJP.<sup>179</sup>

The differences in service regulations lead to a major discrepancy in authority to reduce when administering NJP.

Applying individual service regulations to the appropriate service member, an O-5 commander of a multi-service unit may reduce an E-6 from any branch other than the Marine Corps, but may only reduce an E-7 belonging to the Air Force. This potential disparate treatment may create a perception of unfairness among the troops assigned to a multi-service unit. While commanders must follow individual service regulations when administering NJP, to avoid creating an environment in which members from different services feel they are being treated unfairly, commanders should take into consideration the differences in available punishment power. A basic tenet of military justice is that punishment should be tailored to fit both the misconduct and the offender. This tenet allows commanders great latitude when fashioning appropriate punishment; however, judge advocates should ensure that commanders exercise this authority fully cognizant that their authority varies by service.

*Discussion—CASE #2: Violation of JTF BU General Order #1. After considering all of the service specific punishment parameters, the JTF Commander might choose to level the punishment “playing field” by withholding reduction authority for reductions of more than one grade. Assuming the specialist was not offered summarized treatment, this would mean that all four service members would be at risk of losing only one grade.*

*Alternatively, the JTF Commander might withhold NJP authority altogether to equalize treatment. The one area the JTF Commander cannot equalize is the sailor's inability to refuse NJP.*

*Withholding authority to the JTF Commander's level, however, raises the next issue—appellate authority.*

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174. JAGMAN, *supra* note 23, § 0111e.

175. AR 27-10, *supra* note 23, paras. 3-19b(6), 3-26, tbl. 3-1; AFI 51-202, *supra* note 23, tbl. 3-1.

176. AR 27-10, *supra* note 23, para. 3-19b(6)(a); *see also* U.S. DEP'T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS (2 Oct. 2000) [hereinafter AR 600-8-19].

177. Promotion to E-7 is at the DA level. *See* AR 600-8-19, *supra* note 176, para. 1-7.

178. AFI 51-202, *supra* note 23, tbl. 3.1.

179. FILBERT & KAUFMAN, *supra* note 154, at 66.

*Joint Publication 0-2* gives the following guidance regarding NJP appeals: “[A]ppeals and other actions involving review of nonjudicial punishment imposed by a JFC will follow the appropriate regulations of the offender’s Service.”<sup>180</sup>

*Army Regulation 27-10* directs Army commanders to follow the service regulation of the offender’s service to determine the appellate process and the “next superior” authority for purposes of appeal.<sup>181</sup> With regard to an appeal by an Army service member, *AR 27-10* permits a “next superior” commander to process the appeal *only* if the commander has an Army judge advocate assigned to him or his higher headquarters.<sup>182</sup>

Although *AFI 51-202* does not direct Air Force officers imposing NJP on members of other services to use the offending service member’s service regulation for appeals, logic dictates that they do so. Furthermore, unlike the previous version of *AFI 51-202*, the new version does not direct multi-service commanders imposing NJP on Air Force members to process NJP appeals of those members through Air Force chains of command. The instruction now directs appeals from NJP imposed by a JFC, including an Air Force officer acting in that capacity, to follow the chain of command within the “joint” or “multi-service” unit chain of command.<sup>183</sup>

In a joint service environment, the *Navy Manual* separates NJP appeals by Navy personnel from appeals by Marine Corps personnel; however, it directs both to a general court-martial convening authority.<sup>184</sup> Note, however, that the imposition of

NJP by a Naval officer designated as a commander for purposes of NJP administration is an exception to this general rule. In this limited exception, the service member directs his appeal to the multi-service commander who made the designation, if the multi-service commander made himself the appellate authority. When dividing NJP authority, establishing provisional units to aid in the administration of justice, or both, judge advocates should consider this as a method of keeping the appellate authority within the multi-service unit chain of command.

### Filing Determinations

Each military service maintains its own system of records and system for filing NJP actions. *Joint Publication 0-2* instructs that “the JFC will use the regulations of the offender’s Service when conducting nonjudicial punishment proceedings, including punishment, suspension, mitigation, and filing.”<sup>185</sup> *Army Regulation 27-10* echoes this instruction.<sup>186</sup>

To record NJP actions, the Army uses DA Form 2627 for formal Article 15s and DA Form 2627-1 for summarized proceedings, the Air Force uses AF Form 3070, and the Navy and Marine Corps use *JAGMAN* appendix A-1-d. The Army requires filing of all DA Forms 2627: for soldiers below the grade of E-5, DA Forms 2627 are filed for two years in the soldier’s local file; for all other soldiers, DA Forms 2627 are filed permanently, either in the performance or restricted portion of the service member’s Official Military Personnel File.<sup>187</sup>

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180. JOINT PUB. 0-2, *supra* note 30, at V-21. The section notes an exception to this general practice when the combatant commander takes action: “When the combatant commander personally imposes nonjudicial punishment, or is otherwise disqualified from being the appellate authority, appeals will be forwarded to the Chairman of the Joint Chiefs of Staff for appropriate action by the Secretary of Defense or his designee.” *Id.*

181. *AR 27-10*, *supra* note 23, para. 3-30d.

When an Army commander imposes nonjudicial punishment on a member of another service, the authority “next superior” shall be the authority prescribed by the member’s parent service. (See *JAGMAN* 0117 for Navy and Marine Corps personnel, paragraph 7.1.4, *AFI 51-202* for Air Force personnel, and *MJM*, Article 1-E-11(d) for Coast Guard personnel.) Other provisions of this regulation notwithstanding, an appeal by such member will be processed according to procedures contained in the governing regulation of the member’s parent service.

*Id.*

182. *Id.* para. 3-30e.

When a commander of another service imposes nonjudicial punishment upon a soldier, the authority “next superior” need not be an Army officer or warrant officer. However, the “next superior” commander for purposes of appeals processed under this regulation must have an Army JA [judge advocate] assigned to the commander’s staff or the staff of the commander’s supporting headquarters. When acting on the soldier’s appeal, the Army JA will advise the commander on the appellate procedures prescribed by [*AR 27-10*] and will advise the other than Army commander to ensure compliance with paragraph 3-34 of [*AR 27-10*].

*Id.*

183. *AFI 51-202*, *supra* note 23, paras. 4.2.8-9.

184. *JAGMAN*, *supra* note 23, § 0117.

185. JOINT PUB. 0-2, *supra* note 30, at V-21.

186. *AR 27-10*, *supra* note 23, para. 3-6c.

The Air Force maintains a separate system of selection records for officers and enlisted members in the grade of master sergeant and above. The imposing official can file an NJP record in the offender's selection file, but is not required to do so. To do this, however, the imposing commander must serve the offender with a notification letter at the time the commander imposes punishment.<sup>188</sup> The final filing decision is made after the resolution of any appeal.<sup>189</sup> The letter, along with the Article 15 documentation, is then forwarded to the GCMCA's SJA for a legal review and subsequent forwarding to the appropriate records custodian.<sup>190</sup>

To "file" the imposition of NJP for Navy or Marine Corps personnel, a separate annotation must be made in the member's service record. This annotation is made on "Page 13" for Navy personnel, and on "Page 12" for Marines.<sup>191</sup>

### *Addressing Service Differences*

Judge advocates can handle the differences in NJP among the services in three basic ways: (1) let service-specific commanders impose NJP with the advice of judge advocates from their own service; (2) let service-specific judge advocates provide advice to joint commanders regarding NJP actions against members of their service; and (3) ensure that judge advocates deployed in support of joint commanders are thoroughly cross-trained in the other service's NJP regulations. The first method is certainly the least difficult for deployed judge advocates to support, and although the second method may prove easier than the third, the second method will almost certainly inhibit the trust and confidence the joint commander places in his supporting judge advocate.

As introduced in the vignette discussion above, the multi-service commander has several options he may use to level the punishment playing field in a joint environment. Another option to withholding punishment authority or withholding jurisdiction altogether is for the commander to allow his lower-

level commanders to administer NJP, and then he can adjust punishments at the appellate level if necessary, and if requested. The problem with this option is that it does not address the standard of proof variance among the service regulations. Due to the *Navy Manual's* lower requisite standard of proof, Navy and Marine Corps personnel can be found guilty of an offense for which Army and Air Force personnel, based on the same evidence, are found not guilty.<sup>192</sup>

The dilemma for commanders is whether to allow services to mete out potentially disparate punishment for similar offenses, to dictate the use of a "most restrictive standard" derived from each service to level the potential punishments, or to withhold jurisdiction to their level. Achieving even-handed results almost requires commanders to consider each service's most restrictive limitations as the ceiling on punishment for every service member.

If a commander adopted a most restrictive means test to create a joint NJP standard, the following procedures would result: All service members could seek legal counsel before accepting Article 15 proceedings,<sup>193</sup> and the standard of proof applied would be beyond a reasonable doubt. The most restrictive means test would place limits on authorized field-grade level punishment, as follows: no confinement on bread and water—even if attached or embarked in a vessel, a written reprimand, thirty days' correctional custody, sixty days' restriction, forty-five days' extra duty (limited to two hours per day and not performed on Sunday), and either a reduction of one grade *or* forfeiture of one half month's pay for two months.

All of this might be a good argument for the promulgation of a joint NJP regulation. Absent the adoption of uniform NJP standards and procedures, however, judge advocates serving joint commands must do their best to ensure their commanders apply NJP in an even-handed manner, to protect not only the NJP system, but also the command's they serve.

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187. *Id.* para. 3-37b(1).

188. See U.S. DEP'T OF AIR FORCE, INSTR. 36-2608 MILITARY PERSONNEL RECORDS SYSTEMS (1 July 1996) (providing formats and procedures), available at <http://afpubs.hq.af.mil/pubfiles/af/36/afi36-2608/afi36-2608.pdf>.

189. AFI 51-202, *supra* note 23, para. 4.8.

190. *Id.* paras. 4.8, 6.8.

191. JAGMAN, *supra* note 23, § 0109e (providing sample language to use in such entries); see also *id.* § 0119.

192. See *supra* note 144 and accompanying text. Furthermore, given the strong language of AFI 51-202 counseling commanders to impose reductions and forfeitures only "when the maximum exercise of NJP authority is warranted," an airmen is less likely to receive these punishments than members of other services tried for the same offense by their respective services.

193. Due to the *Navy Manual's* language discouraging the creation of attorney-client relationships during NJP proceedings, either Army or Air Force judge advocates may have to provide Navy and Marine Corps personnel pre-Article 15 advice. See JAGMAN, *supra* note 23, § 0109d(2). "Military lawyers making such explanations should guard against the establishment of any attorney-client relationship unless detailed by proper authority to serve as defense counsel or personal representative of the accused." *Id.*

## Conclusion

Joint justice currently presents three distinct problem areas—establishing judicial and NJP jurisdiction, level of court-martial convening authority, and administration of NJP. Joint commanders should feel confident in their ability to exercise judicial and NJP authority over forces assigned to them, regardless of service.

To this end, every judge advocate should (1) be sufficiently familiar with the process of establishing units to assist effectively in the establishment of appropriate jurisdictional chains, (2) actively seek to have multi-service commanders empow-

ered as GCMCAs to help increase the commander's administrative and judicial options, and (3), absent the adoption of a joint NJP regulation, cross-train with sister-service NJP regulations. Most importantly, judge advocates should not wait until they are packing for a deployment to learn about joint justice.

The concepts and areas of concern involved with the administration of justice in a joint environment should be taught by chiefs of justice to their new trial counsel and incorporated into each service's basic judge advocate training. Education is the key; hopefully this article removes some of the haze from the practice of joint justice

## Appendix A

### Article 15, UCMJ and MCM, pt. V - Nonjudicial Punishment Limits

| MCM, pt. V and UCMJ Art 15 -<br>NJP Limits Chart  | On Officers by               |                              |  | On Enlisted Personnel By               |                                     |
|---|------------------------------|------------------------------|--|--|-------------------------------------|
|   | CO who is<br>O-3 or<br>below | CO who is<br>O-4 or<br>above | CO who is<br>GCMCA,<br>General Officer<br>or Flag Rank | CO who is O-3 or<br>below (or any OIC) | CO who is O-4 or<br>above           |
| Admonition/Reprimand <i>plus</i> one<br>or more of the following  | Written (1)                  | Written (1)                  | Written (1)  | Oral or Written                        | Oral or Written                     |
| Confinement on Bread & Water if<br>attached to or embarked in a vessel<br>(B&W) (2)   |                              |                              |  | 3 days                                 | 3 days                              |
| Correctional Custody (CC)   |                              |                              |  | 7 days                                 | 30 days                             |
| Arrest in Quarters (AiQ)  |                              |                              | 30 days  |  |                                     |
| Restriction to limits with or<br>without suspension of duty   | 30 days                      | 30 days                      | 60 days  | 14 days                                | 60 days                             |
| Extra Duties (ED)   |                              |                              |  | 14 days                                | 45 days                             |
| Forfeiture (3)  |                              |                              | 1/2 per 2 month  | 7 days pay                             | 1/2 per 2 month                     |
| Reduction in rate (4)   |                              |                              |  | one grade                              | To the lowest<br>enlisted grade (5) |
| Detention of Pay (6)  |                              |                              | 1/2 per 3 month  | 14 days pay                            | 1/2 per 3 month                     |
| NOTES:  |                              |                              |  |  |                                     |
| 1 - MCM Part V permits only written. Art 15 makes no distinction.   |                              |                              |  |  |                                     |
| 2 - No limit is placed on enlisted ranks that may be subject to this punishment.  |                              |                              |  |  |                                     |
| 3 - Forfeiture is in the grade to which reduced even if reduction is suspended.   |                              |                              |  |  |                                     |
| 4 - If within the promotion authority of the officer imposing the reduction.  |                              |                              |  |  |                                     |
| 5 - Art 15 limits reductions of E-5 and above to a maximum of two grades. MCM, pt. V further limits reductions of grades E-5 and above to a maximum of one grade, but allows for an increase to two grades by the "Secretary concerned" in time of war or national emergency. |                              |                              |  |  |                                     |
| 6 - Detention of Pay is not provided for in MCM, pt. V.   |                              |                              |  |  |                                     |
| COMBINATION RESTRICTIONS:   |                              |                              |  |  |                                     |
| - B&W cannot be combined with CC, ED, or restriction. (MCM, pt. V)  |                              |                              |  |  |                                     |
| - CC cannot be combined with ED or restriction. (MCM, pt. V)  |                              |                              |  |  |                                     |
| - AiQ cannot be combined with restriction. (MCM, pt. V)   |                              |                              |  |  |                                     |
| - B&W, CC, Restriction, AiQ, and ED must run concurrently up to their maximum unless apportioned. (Art. 15, UCMJ)   |                              |                              |  |  |                                     |
| - Restriction and ED may be combined to run concurrently but may not to exceed max for ED. (MCM, pt. V)   |                              |                              |  |  |                                     |

## Appendix B

### Navy and Marine Corps Nonjudicial Punishment Chart

| Navy NJP Limits Chart   | Summarized | On Officers by   |                        |                                  | On Enlisted Personnel by            |                        |
|---|------------|--|------------------------|----------------------------------|-------------------------------------|------------------------|
|   |            | CO who is O-3 or below   | CO who is O-4 or above | CO who is a General or Flag Rank | CO who is O-3 or below (or any OIC) | CO who is O-4 or above |
| Admonition/Reprimand (1) <i>plus</i> one or more of the following   | N/A        | Written  | Written                | Written                          | Oral or Written                     | Oral or Written        |
| Confinement on Bread & Water if attached to or embarked in a vessel (2)   | N/A        |  |                        |                                  | 3 days                              | 3 Days                 |
| Correctional Custody (3)  | N/A        |  |                        |                                  | 7 days                              | 30 days                |
| Arrest in Quarters  | N/A        |  |                        | 30 days                          |                                     |                        |
| Restriction to limits with or without suspension of duty  | N/A        | 15 days (4)  | 30 days                | 60 days                          | 14 days                             | 60 days                |
| Extra Duties (5)  | N/A        |  |                        |                                  | 14 days                             | 45 days                |
| Forfeiture (6)  | N/A        |  |                        | 1/2 per 2 month                  | 7 days pay                          | 1/2 per 2 month        |
| Reduction in rate (7)   | N/A        |  |                        |                                  | one grade                           | one grade              |
|   |            |  |                        |                                  |                                     |                        |
| Right to Counsel? (8)   | N/A        | Limited  | Limited                | Limited                          | Limited                             | Limited                |
| Recording of NJP  | N/A        | JAGMAN Appendix A-1-d  |                        |                                  |                                     |                        |
| Filing of NJP Record  | N/A        | Service-record entries on Page 13 (Navy) or Page 12 (Marine Corps) (9) |                        |                                  |                                     |                        |
|   |            |  |                        |                                  |                                     |                        |
| NOTES:  |            |  |                        |                                  |                                     |                        |
| 1 - JAGMAN 0114c.   |            |  |                        |                                  |                                     |                        |
| 2 - Only for E-3 and below (includes unsuspended reduction to below E-4). (JAGMAN 0111c)  |            |  |                        |                                  |                                     |                        |
| 3 - Only for E-3 and below (unless unsuspended reduction to below E-4 is imposed). (JAGMAN 0111b)   |            |  |                        |                                  |                                     |                        |
| 4 - JAGMAN 0111a  |            |  |                        |                                  |                                     |                        |
| 5 - "Normally" limited to 2 hours per day; Shall not be performed on Sunday; "Guard duty shall not be assigned as punishment." (JAGMAN 0111d)   |            |  |                        |                                  |                                     |                        |
| 6 - Forfeiture is in the grade to which reduced even if reduction is suspended.   |            |  |                        |                                  |                                     |                        |
| 7 - No reduction from pay grade E-7 or above in the Navy. No reduction from pay grade E-6 or above in the Marine Corps. (JAGMAN 0111e)  |            |  |                        |                                  |                                     |                        |
| 8 - See JAGMAN 109a and 109d(2). Together these sections provide the following: "There is no right for an accused to consult with counsel prior to nonjudicial punishment;" however, if an accused is given the opportunity, such advice is limited to "an explanation of the legal ramifications involved in the right to refuse [NJP]." |            |  |                        |                                  |                                     |                        |
| 9 - Only if JAGMAN Appendix A-1-d is used or SM was represented by lawyer at the hearing. (JAGMAN 0109e)  |            |  |                        |                                  |                                     |                        |
| 10 - See MCM, Part V, paragraph 5d for further limitations on combinations of punishments.  |            |  |                        |                                  |                                     |                        |

(JAGMAN)

## Appendix C

### Army Nonjudicial Punishment Chart

| Army NJP Limits chart   | Summarized           | On Officers by                           |                                      | On Enlisted Personnel By            |                                     |
|---|----------------------|--|--------------------------------------|-------------------------------------|-------------------------------------|
|   |                      | CO who is NOT a General Officer or GCMCA | CO who is a General Officer or GCMCA | CO who is O-3 or below (or any OIC) | CO who is O-4 or above              |
| Admonition/Reprimand <i>plus</i> one or more of the following   | Oral                 | Written                                  | Written                              | Oral or Written                     | Oral or Written                     |
| Confinement on Bread & Water if attached to or embarked in a vessel (1)   |                      |  |                                      | 3 days                              | 3 Days                              |
| Correctional Custody (2)  |                      |  |                                      | 7 days                              | 30 days                             |
| Arrest in Quarters (3)  |                      |  | 30 days                              |                                     |                                     |
| Restriction to limits with or without suspension of duty  | 14 days              | 30 days                                  | 60 days                              | 14 days                             | 60 days                             |
| Extra Duties (ED) (4)   | 14 days              |  |                                      | 14 days                             | 45 days                             |
| Forfeiture (5)  |                      |  | 1/2 per 2 month                      | 7 days pay (6)                      | 1/2 per 2 month                     |
| Reduction in grade (7)  |                      |  |                                      | One grade (8)                       | To the lowest enlisted grade (8, 9) |
|   |                      |  |                                      |                                     |                                     |
| Right to Counsel?   | None                 | Yes                                      | Yes                                  | Yes                                 | Yes                                 |
| Recording of NJP  | DA Form 2627-1       | DA Form 2627                             |                                      |                                     |                                     |
| Filing of NJP Record  | Local file (2yr max) | OMPF Performance or restricted           |                                      |                                     |                                     |
|   |                      |  |                                      |                                     |                                     |
| NOTES:  |                      |  |                                      |                                     |                                     |
| 1 - Imposable only on E-3 and below. (AR 27-10, para. 3-19b(2)) Cannot be combined with correctional custody, extra duty or restriction.  |                      |  |                                      |                                     |                                     |
| 2 - Not available for E4 and above unless unsuspended reduction to below E4 is imposed. (AR 27-10 para. 3-19b(1)) Cannot combine with ED or restriction.  |                      |  |                                      |                                     |                                     |
| 3 - Arrest in Quarters cannot be combined with restriction.   |                      |  |                                      |                                     |                                     |
| 4 - Restriction and Extra Duty may be combined to run concurrently (not to exceed maximum allowed for Extra Duty).  |                      |  |                                      |                                     |                                     |
| 5 - Forfeiture is in the grade to which reduced even if reduction is suspended.   |                      |  |                                      |                                     |                                     |
| 6 - Must be within one month (i.e. no forfeiture for 3 days for 2 months).  |                      |  |                                      |                                     |                                     |
| 7 - Promotions to E-7, E-8 and E-9 are done at DA level, therefore, no commander has reduction authority. (AR 600-200 para. 7-36)   |                      |  |                                      |                                     |                                     |
| 8 - If within the promotion authority of the officer imposing the reduction. For example O-4 commanders (not serving in O-5 or higher billet) do not have the authority to promote to E-5 or E-6 under AR 600-8-19, therefore cannot reduce from those ranks. |                      |  |                                      |                                     |                                     |
| 9 - Grades E-5 and above may not be reduced more than one grade. May be increased to two grades by the "Secretary" concerned in time of war or national emergency. (MCM pt. V, ¶ 5b(2)(B)(iv))  |                      |  |                                      |                                     |                                     |
| 10 - See MCM, Part V, paragraph 5d for further limitations on combinations of punishments.  |                      |  |                                      |                                     |                                     |

(AR 27-10)

## Appendix D

### Air Force Nonjudicial Punishment Chart

| Air Force NJP Limits chart   | Summarized | On Officers by  |               |                          | On Enlisted Personnel By    |                     |                           |
|--|------------|---|---------------|--------------------------|-----------------------------|---------------------|---------------------------|
|  |            | CO who is Lt Col or below   | CO who is Col | General Officer or GCMCA | CO who is Capt or below (1) | CO who is Major (1) | CO who is Lt Col or above |
| Admonition/Reprimand <i>plus</i> one or more of the following  | N/A        | None  | Written       | Written                  | Written                     | Written             | Written                   |
| Confinement on Bread & Water if attached to or embarked in a vessel  | N/A        |   |               |                          | Not Authorized              | Not Authorized      | Not Authorized            |
| Correctional Custody   | N/A        |   |               |                          | 7 days                      | 30 days             | 30 days                   |
| Arrest in Quarters   | N/A        |   |               | 30 days                  |                             |                     |                           |
| Restriction to limits with or without suspension of duty   | N/A        | None  | 30 days       | 60 days                  | 14 days                     | 60 days             | 60 days                   |
| Extra Duties (2)   | N/A        |   |               |                          | 14 days                     | 45 days             | 45 days                   |
| Forfeiture (3), (4)  | N/A        |   |               | 1/2 per 2 month          | 7 days pay                  | 1/2 per 2 month     | 1/2 per 2 month           |
| Reduction in grade   | N/A        |   |               |                          | One grade (5)               | See Notes (4), (7)  | See Notes (7), (8), (9)   |
|  |            |   |               |                          |                             |                     |                           |
| Right to Counsel ?   | N/A        | N/A   | Yes           | Yes                      | Yes                         | Yes                 | Yes                       |
| Recording of NJP   | N/A        | AF Form 3070  |               |                          |                             |                     |                           |
| Filing of NJP Record   | N/A        | Filing in Selection Record is possible (Officer or Senior NCO) (10) |               |                          |                             |                     |                           |
|  |            |   |               |                          |                             |                     |                           |
| NOTES:   |            |   |               |                          |                             |                     |                           |
| 1 - May not impose NJP on CMSgt or SMSgt.  |            |   |               |                          |                             |                     |                           |
| 2 - Restriction and Extra Duty may be combined to run concurrently (not to exceed maximum allowed for Extra Duty).   |            |   |               |                          |                             |                     |                           |
| 3 - "[C]ommanders should impose an unsuspended reduction in grade, along with forfeiture of pay, only when the maximum exercise of Article 15 authority is warranted. (e.g. repeat offender, most serious offenses, past rehabilitative efforts have failed, or recalcitrant offender)." (AFI 51-202 para 5.4.2) |            |   |               |                          |                             |                     |                           |
| 4 - Forfeiture is in the grade to which reduced even if reduction is suspended.  |            |   |               |                          |                             |                     |                           |
| 5 - SSgt and below.  |            |   |               |                          |                             |                     |                           |
| 6 - TSgt, SSgt - one grade. SrA and below - to lowest enlisted grade.  |            |   |               |                          |                             |                     |                           |
| 7 - Grades E-5 and above may not be reduced more than one grade. (May be increased to two grades by the "Secretary concerned" in time of war or national emergency." (MCM pt. V, ¶ 5b(2)(B)(iv)).  |            |   |               |                          |                             |                     |                           |
| 8 - MSgt, TSgt, SSgt - one grade. SrA and below - to lowest enlisted grade.  |            |   |               |                          |                             |                     |                           |
| 9 - CMSgt, SMSgt - one grade if imposing officer is MAJCOM commander, combatant commander, or commander to whom promotion authority has been delegated.  |            |   |               |                          |                             |                     |                           |
| 10 - Must serve offender with a notification of intent letter when imposing punishment. (IAW AFI 36-2608, Military Personnel Records System) (AFI 51-202 para 4.8)   |            |   |               |                          |                             |                     |                           |
| 11- See MCM, Part V, paragraph 5d for further limitations on combinations of punishments.  |            |   |               |                          |                             |                     |                           |

(AFI 51-202)

# Bid Protests: An Overview for Agency Counsel

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*There have been many attempts to reduce waste and excessive costs, especially with respect to the procurement of major weapons over the last two decades. Beginning in the early sixties, practically every Secretary of Defense has made good faith efforts to try to stop the leaks in the acquisition process from draining off valuable defense dollars. Yet, it seems these efforts to reduce the costs of buying weapons and other goods in [the Department of Defense] is like playing catch with a wet cake of soap—as soon as you think you have got it in your hands, it somehow slips away.*<sup>1</sup>

It is late Friday afternoon, just before Christmas. As you sit at your desk thinking about the holiday dinner you are going to cook over the weekend, you hear a document come through the fax machine. Confident it is not for you, you ignore the machine and complete your grocery list. Suddenly, from the corner of your eye, you see your colleague approach holding papers in his hand. He shoots you an empathetic smile, wishes you a Happy Holiday as he drops a faxed bid protest filing on your desk, and leaves for the night. After a while, your stunned silence recedes, and you begin to wonder what to do.

Do not fear. This guide will help you grasp the bid protest “cake of soap,” and will wash your hands of any concerns about wasting valuable defense dollars. Written for agency attorneys new to bid protests and those looking for a review of the rules, this article provides practitioners with a basic understanding of the General Accounting Office (GAO) bid-protest process and practical tips for defending bid protests.

## Introduction

The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly and, whenever possible, in a way that maximizes competition. On occasion, however, bidders or others interested in government procurements may believe that an agency has awarded (or will award) a contract improperly, or that they have been unfairly denied a contract or the opportunity

to compete for a contract. A major avenue of relief for those concerned about the propriety of an award has been the GAO.<sup>2</sup> For almost seventy-five years, the GAO “has provided an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts.”<sup>3</sup>

## Initial Actions upon Receipt

After reading the bid protest, agency counsel should first contact their Directorate of Contracting and find out if the contracting officer knows about the protest. If not, counsel must immediately send her a copy. Second, agency counsel should call their agency’s contract litigation office, inform them of the protest, and ensure they also have a copy. A positive, proactive relationship between the installation attorney and the agency’s litigation attorney is extremely important. Next, counsel must start thinking about how to defend against the protest.

## How Did This Protest Land on the Agency’s Desk, and What Should Agency Counsel Expect?

The bid-protest process at the GAO begins when the protester files a written protest.<sup>4</sup> After receiving the protest,<sup>5</sup> the GAO will send a copy to the relevant contracting agency.<sup>6</sup> The GAO requires the contracting agency to respond by filing an agency report with the GAO and providing a copy to the protester. The protester can then file written comments to the agency’s report. Under limited circumstances, the GAO allows parties other than the protester and the agency to intervene in the protest by filing written comments on the report. Generally, these intervening parties can also receive a copy of the protest, the agency report, and any other protest filings.<sup>7</sup>

After these steps are completed, the GAO attorney assigned to the bid protest may schedule conferences to resolve procedural matters or other issues necessary to dispose of the protest. If a hearing is necessary, the GAO attorney “will usually conduct a pre-hearing conference to decide the issues [the hearing

1. *Acquisition Process in the Dep’t of Defense: Hearings Before the Comm. on Gov’t Affairs*, 97th Cong. 1 (1981) (statement of Sen. William V. Roth, Jr., Chairman).

2. Protesters often select the GAO because this forum resolves issues faster and cheaper than court litigation. Two other forums contractors can protest contract issues are (1) the Court of Federal Claims, and (2) within the specific contracting agency itself. On 1 January 2001, the Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491(b)(1) (2000), removed bid protest jurisdiction from U.S. District Courts. This article focuses only on bid protests to the GAO.

3. OFFICE OF GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, *BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 1* (1996) [hereinafter *GAO BID PROTEST GUIDE*] (providing guidance to parties participating in a bid protest at the GAO), available at <http://www.gao.gov/special.pubs/og96024.htm>.

4. *Id.* at 7. Protesters can represent themselves pro se or by counsel. *Id.*

will address], identify . . . witnesses who will testify . . . , and to settle any [outstanding] procedural questions. After the hearing, all parties [can] submit written comments on the hearing.”<sup>8</sup>

After completing the record, the GAO attorney will consider the facts, the issues in dispute, and the law, and will then issue an opinion. He can sustain, dismiss, or deny the protest, and he must “issue his decision [within] 100 days from the date the protest was filed.”<sup>9</sup> The GAO will mail the decision to the parties.<sup>10</sup>

## The Protest—Preliminary Issues

### *Does the GAO Have Subject-Matter Jurisdiction?*

As in all litigation, the first item agency counsel should consider when reviewing a bid protest is whether the GAO has subject-matter jurisdiction. If the GAO does not have jurisdiction, the protest should be dismissed.

Jurisdiction is not litigated extensively because the GAO has jurisdiction over most bid protests. As such, counsel sometimes overlook this important first step. The GAO has subject-matter jurisdiction when the protest alleges that a federal agency violated a procurement statute or regulation,<sup>11</sup> acted unreasonably and abused its discretion,<sup>12</sup> or based a termination on the improprieties in the award of the contract.<sup>13</sup> Protesters must provide a detailed statement of the facts and explain the legal theory upon which the protest is based.<sup>14</sup> If they do not, agency counsel should ask the GAO to dismiss the protest for this failure<sup>15</sup> or for being frivolous.<sup>16</sup>

The protester must also make a prima facie case of improper agency action. If the protester fails to meet this minimum standard, the GAO will dismiss the protest, as in *Brackett Aircraft Radio Co.*<sup>17</sup> In *Brackett*, the agency cancelled an invitation for bids (IFB) before bid opening because the government’s needs changed. Brackett protested, arguing that “a reduction in agency’s requirements is not a proper basis for cancellation of an IFB after bid opening because [the Federal Acquisition Reg-

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5. On 6 October 2000, the GAO commenced a pilot program for electronically filing bid protests. This is the first step of an incremental bid-protest program designed to keep the GAO bid protest procedures in step with technology. Currently, five GAO attorneys are participating in this program. The program permits parties to file two types of electronic data: filings or communications transmitted via e-mail and filings provided on electronic media. *GAO Launches Pilot Project to Test E-Filings in Bid Protests*, 74 FED. CONT. REP. (BNA) 316 (2000).

The ground rules for using the e-mail system include:

- (1) protests and protected documents or communications may not be transmitted via e-mail,
- (2) an e-mail address list of all relevant persons from each party to the protest must be established at the beginning of each protest,
- (3) the party sending an e-mail assumes the risk of late or non-receipt, and
- (4) all parties sending e-mails must utilize the return receipt function.

*Id.* The ground rules for filing on electronic media include:

- (1) all submitted documents must be compatible with GAO computer hardware and software,
- (2) all filings must be indexed or organized so that their contents are easily ascertained and searched,
- (3) documents will be considered filed if they are posted on the Internet and accessible to all parties; and
- (4) that the GAO reserves the right to request that any document be submitted in paper form.

*Id.*

6. 4 C.F.R. § 21.1(e) (LEXIS 2002).

7. GAO BID PROTEST GUIDE, *supra* note 3, at 8.

8. *Id.* Unless the GAO sets a different date, all written comments are due five days after the hearing ends. *Id.* at 35.

9. 4 C.F.R. § 21.9(a).

10. GAO BID PROTEST GUIDE, *supra* note 3, at 19.

11. 31 U.S.C. § 3552 (2000).

12. *S.D.M. Supply Inc.*, Comp. Gen. B-271492, June 26, 1996, 96-1 CPD ¶ 288.

13. 4 C.F.R. § 21.1(a).

14. *Id.* § 21.1(c).

15. In *Fed. Computer Int’l Corp.*, B-257618.2, 1994 U.S. Comp. Gen. LEXIS 612 (July 14, 1994), the GAO dismissed the protest for not providing a detailed statement of facts and legal theory upon which the protest was based. In this case, the protester used the generic pleading language “upon information and belief” to support its allegations instead of factual evidence. *Id.* at \*1. The protester argued that it was only required to provide allegations or sufficient evidence to establish its likelihood of prevailing. The GAO dismissed the protest, stating that the “[p]rotester must provide more than a bare allegation; [a protester must support its allegations] with some explanation that establishes the likelihood that its claims of improper agency action [will prevail].” *Id.* at \*2.

ulations (FAR) do not explicitly authorize this basis].”<sup>18</sup> Emphasizing the timing of the cancellation, the GAO noted that federal agencies have the discretion to cancel IFBs before bid opening. The GAO ruled that the agency did not abuse its discretion, and dismissed the protest for failure to establish a prima facie case of improper agency action.<sup>19</sup>

Practically speaking, most protests challenge the acceptance or rejection of a bid, or the award or proposed award of a contract.<sup>20</sup> To avoid dismissal, protest allegations should contain a reasonable degree of specificity<sup>21</sup> and show material harm to the protester.<sup>22</sup> Successful protests must include facts establishing that the agency failed to act as required.<sup>23</sup>

Finally, as a matter of law, the GAO does not have jurisdiction over protests involving contract-administration matters, small business size and industrial classification determinations, small business certificate of competency determinations, section 8(a) Small Business Act procurements, affirmative responsibility determinations, subcontractor protests, procurements by non-federal agencies, and judicial proceedings.<sup>24</sup> Additionally, the GAO will not review allegations of Procurement Integrity Act violations unless the protester reports the allegation and the supporting evidence to the federal agency responsible for

the procurement within fourteen days after the protester first discovered the possible violation.<sup>25</sup>

### *Is the Protest Timely?*

Next, agency counsel should determine if the protest was filed on time because the GAO strictly enforces its timeliness rules.<sup>26</sup> The GAO may dismiss a protest filed only a minute late.<sup>27</sup> Although the timeliness rules and exceptions may appear complicated at first glance, the fundamental concept underlying them is that “Late is Late.”

### **GAO Rules Regulating When Protests Must Be Filed**

Determining the timeliness of a bid protest requires evaluating them under three criteria: (1) whether the protest was filed before or after contract award; (2) whether the protest complies with the required debriefing rule; and (3) whether the protest complies with agency protest rules.

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16. In *Odgen Support Serv., Inc.—Reconsideration*, Comp. Gen. B-270354.3, June 11, 1997, 97-1 CPD ¶ 212, the GAO dismissed the protester’s request for reconsideration because the issue was too general. In the initial protest, the protester alleged that the agency evaluated the protester’s proposal unfairly and unequally against the awardee’s proposal. This initial protest contained numerous detailed allegations involving only the protester and the awardee. The GAO ruled that the agency conducted reasonable evaluations of Odgen’s proposals, and it determined that Odgen was not an interested party because an intervening offeror had a higher technical rating and lower cost than Odgen. The initial protest was denied in part and dismissed in part. *Id.* at 1-3.

Odgen requested reconsideration of the initial ruling, alleging that the GAO improperly failed to consider that its allegation of unequal and unfair evaluations applied to all offerors. Odgen did not submit any evidence in support of this new, broader allegation. *Id.* at 1-2. The GAO denied Odgen’s request for reconsideration, holding that “such a general allegation would be insufficient to constitute a protest under our Bid Protest Regulations, 4 C.F.R. § 21.2(c).” *Id.* at 2.

17. Comp. Gen. B-244831.2, Dec. 27, 1991, 91-2 CPD ¶ 585.

18. *Id.* at 1.

19. *Id.* at 2.

20. GAO BID PROTEST GUIDE, *supra* note 3, at 9.

21. See, e.g., *Palmetto Container Co.*, Comp. Gen. B-237534, Nov. 8, 1989, 89-2 CPD ¶ 447.

22. See, e.g., *Int’l Bus. Sys., Inc.*, Comp. Gen. B-270632.2, June 27, 1996, 96-1 CPD ¶ 276. In *International Business Systems, Inc.*, the GAO denied the protester’s attempt to stop the agency from recalculating a competitor’s best and final offer (BAFO) after the agency discovered an obvious clerical mistake that the contracting officer should have discovered earlier. The GAO determined that the protester suffered no material harm in allowing the agency to correct its obvious clerical mistake and evaluate all BAFOs in accordance with the pricing instructions in its request for proposals. *Id.*

23. 4 C.F.R. § 21.5 (LEXIS 2002).

24. *Id.* § 21.5.

25. *Id.* § 21.5(d).

26. GAO BID PROTEST GUIDE, *supra* note 3, at 12. The GAO strictly enforces the statutory timelines governing the filing of bid protests to minimize the impact of bid protests on the procurement process. JOHN CIBINIC, JR. & RALPH C. NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 1503 (3d ed. 1998).

27. GAO BID PROTEST GUIDE, *supra* note 3, at 42. The GAO must receive a document by 5:30 p.m., eastern time, for it to consider the document as filed on that day. *Id.*

Protesters alleging an impropriety or error in a solicitation, which is apparent on the face of the solicitation, must file their protests with the GAO before bid opening or before the closing date for receipt of initial proposals.<sup>28</sup> Otherwise, such protests are ripe for dismissal.<sup>29</sup>

If agency counsel cannot get the entire protest dismissed as late, they should evaluate protest allegations individually for timeliness. If some allegations are late, the GAO may dismiss these, and then rule on the remaining allegations. In *Coastal Drilling, Inc.*,<sup>30</sup> the protester alleged, after contract award, that the agency improperly tailored the contract specifications and improperly evaluated the protester's proposal. The GAO considered the improper specification untimely, ruling only on the evaluation issue.<sup>31</sup>

The GAO is also interested in ensuring that protesters raise all allegations of improprieties and errors in the solicitation (and all of its amendments) before bids are opened or before initial proposals are due.<sup>32</sup> In *Parcel 47C L.L.C.*,<sup>33</sup> for example, the GAO would not hear any challenges to solicitation amendments filed after the receipt of proposals were due, stating that the bid protest regulations "do not contemplate the piecemeal development of protest issues."<sup>34</sup>

If the protester feels that the agency committed an impropriety or error other than during the period discussed above, the protester must file its protest with the GAO within ten days of the date the protester knew, or should have known, of the basis for protest.<sup>35</sup> Protesters sometimes procrastinate and file protests after the ten-day period, or they think of new issues to raise after these ten days pass. When this happens, agency counsel may get the protest dismissed on timeliness grounds. Other times, protesters may attempt to disguise untimely protests as supplemental matters to an earlier and timely filed protest. If a subsequent filing presents new and independent grounds for protest, rather than providing additional support for an earlier, timely protest, agency counsel should consider having the filing dismissed.<sup>36</sup>

In other situations, protesters granted an extension to file comments to the agency report<sup>37</sup> may attempt to file new protest allegations, thinking the extension also allows them additional time to file new allegations.<sup>38</sup> Agency counsel should remain wary of this situation, and move to dismiss such protests as untimely.<sup>39</sup>

### Debriefings and Protests

Bidders participating in competitive proposals are afforded debriefings. When a debriefing is requested within a specific time period, a protester cannot file a protest before the debrief-

28. 4 C.F.R. § 21.2(a)(1).

29. See, e.g., Neal R. Gross, Comp. Gen. B-275066, Jan. 17, 1997, 97-1 CPD ¶ 30. In *Neal R. Gross*, the GAO denied the protest, stating that the protester's objection to the proposed price-evaluation method was untimely because the protester raised this allegation after contract award. *Id.* at 4-5.

30. Comp. Gen. B-285085.3, July 20, 2000, 2000 CPD ¶ 130.

31. *Id.* at 4 n.2.

32. CIBINIC & NASH, *supra* note 26, at 1503.

33. B-286324, B-286324.2, 2000 Comp. Gen. LEXIS 215 (Dec. 26, 2000).

34. *Id.* at \*10.

35. 4 C.F.R. § 21.2(a)(2) (LEXIS 2002).

36. Ti Hu, Inc., Comp. Gen. B-284360, Mar. 31, 2000, 2000 CPD ¶ 62, at 4 (citing Vinnell Corp., Comp. Gen. B-270793, B-270793.2, Apr. 24, 1996, 96-1 CPD ¶ 271, at 7).

37. The protester and any intervenors can file written comments on the agency report. 4 C.F.R. § 21.3(i). The parties have ten days from the date of receipt of the agency report to file these comments with the GAO and the agency. *Id.* The comments allow the protester to refute the agency's version of the facts and applicable law and regulations. Unless the protester raises new, timely allegations in its comments, the agency cannot file any additional explanation based upon the protester's comments unless the GAO so requests. Agency counsel may request to provide the GAO and the parties with such an additional submission, however. The GAO attorney will then determine whether such a submission is warranted and advise the parties of this decision. Agency counsel should be cautious regarding additional submissions, however, since the GAO will probably allow the protester to respond to the agency's submission, thereby restarting the ten-day clock for any new protest issues.

38. See GAO BID PROTEST GUIDE, *supra* note 3, at 17. According to the GAO, if it grants a protester an extension to file comments to the agency report, such an extension does not extend the ten-day timeframe for filing a timely supplemental protest for allegations that the protester knew, or should have known, from the agency report. *Id.*

ing date offered to the protester, and the protest must be filed not later than ten days after the debriefing is conducted.<sup>40</sup> Agency counsel should therefore move to dismiss all protests filed before a requested debriefing is held. The GAO ruled in *Omni Corp.*<sup>41</sup> that it will dismiss such protests as premature, even if the protest basis is known before the debriefing.<sup>42</sup> The GAO's rationale for strictly enforcing this rule is to "encourage early and meaningful debriefings, and to preclude strategic or defensive protests."<sup>43</sup> Counsel can convince the GAO to dismiss these premature protests by simply faxing the GAO a copy of the letter advising the protester of the debriefing date along with a request that the GAO dismiss the protest as untimely. Usually, the GAO will then dismiss the protest without prejudice.<sup>44</sup>

#### *Agency Level Protests—Follow-On Protests to the GAO*

When a party files a protest with an agency, and then wishes to contest the agency's determination, the party must file with the GAO within ten days after receiving actual or constructive notice of the initial adverse agency decision.<sup>45</sup> Examples of adverse agency actions include: "the agency's proceeding with bid opening or the receipt of proposals, the rejection of a bid or proposal, . . . the award of a contract despite the agency-level protest, [and] any [other] action [indicating] that the agency is denying the agency-level protest."<sup>46</sup>

Despite the rules stated above, the GAO may consider late protests: (1) if the protester raises issues "significant . . . to the procurement community;" or "exceptional circumstances beyond the protester's control caused the delay in filing the protest[.]"<sup>47</sup> Fortunately, however, the GAO rarely invokes these exceptions.<sup>48</sup>

#### *Does the Protest Complaint State a Basis for Protest?*

Although no formal requirement specifies exactly what a protest letter should include, all protests must provide a detailed factual and legal statement outlining the basis for the protest; identify the protester's name, address, and telephone number; identify the protested transaction; state the relief sought; and contain the signature of the protester or its representative.<sup>49</sup> If the protest allegations do not: (1) include sufficient facts to form a basis of protest; and (2) establish the likelihood that the protester will prevail in its claims of improper agency action, the GAO can dismiss the protest.<sup>50</sup>

Before filing a motion to dismiss, agency counsel should consider two practical issues. First, counsel should consider whether the protester is representing himself or is represented by counsel. Second, counsel should consider the time elapsed since the protest was filed.

The type of representation used by the protester should affect how agency counsel approach the issue of dismissal. For

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39. See, e.g., SDS Int'l, B-285821, 2000 Comp. Gen. LEXIS 139 (Sept. 21, 2000). In *SDS International*, the GAO granted the protester an extension to file comments on the agency report. Fourteen days after receiving the report, the protester filed a supplemental protest challenging the award of the contract. The GAO dismissed the supplemental protest based on matters contained in the agency report because the protester did not file within ten days after learning of the basis of the protest. The GAO ruled that an extension issued for the purpose of filing comments to an agency report does not waive timeliness rules with regard to new grounds of protest. *Id.* at \*11.

40. 4 C.F.R. § 21.2(a)(2). An offeror must request a debriefing from the agency, in writing, within three days after receiving notification of contract award. The agency should, to the maximum extent practicable, conduct the debriefing within five days after receiving the protester's written request. 31 U.S.C. § 3553(d) (2000); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. § 15.506 (Feb. 2001) [hereinafter FAR].

41. Comp. Gen. B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159.

42. *Id.* at 6 (citing 4 C.F.R. § 21.2(a)(2) (1998)).

43. Minotaur Eng'g, Comp. Gen. B-276843, May 22, 1997, 97-1 CPD ¶194, at 3.

44. See GAO BID PROTEST GUIDE, *supra* note 3, at 15.

45. 4 C.F.R. § 21.2 (a)(3) (LEXIS 2002).

46. GAO BID PROTEST GUIDE, *supra* note 3, at 13.

47. *Id.* at 14.

48. See *id.*

49. See 4 C.F.R. § 21.1.

50. See, e.g., Science Applications Int'l Corp., B-265607.2, 1995 U.S. Comp. Gen. LEXIS 612 (Sept. 20, 1995); Vero Tech. Servs., Comp. Gen. B-282373.3, B-282373.4, Aug. 31, 1999, 99-2 CPD ¶ 50. In *Science Applications*, the GAO dismissed the protest as legally insufficient because the agency completely refuted the protester's allegations, and because the protester provided no evidence or a detailed factual statement to support its allegations. 1995 U.S. Comp. Gen. LEXIS 612, at \*6. In *Vero Technical Services*, the GAO found that no convincing evidence supported the protester's contentions. The GAO dismissed the protest, concluding that the protester's mere speculation did not provide a basis to sustain the protest. *Vero Tech. Servs.*, 99-2 CPD ¶ 50, at 3.

example, if the protester is a pro se small business owner filing his first protest, the GAO will likely let this protester amend his pleadings. Because of this, agency counsel can ease the process, better her reputation with the GAO, and improve relations with the protester by asking the protester directly for the missing information. This should also foster better communication between the protester and the government.

On the other hand, if the protester is represented by counsel, the GAO may enforce its rules more stringently since counsel are expected to know basic filing requirements. Agency counsel should take into consideration whether the omission is merely an administrative oversight, such as a telephone number, or substantive, such as failing to assert sufficient facts to establish the likelihood of prevailing. The closer the omission is to being a substantive flaw in the pleading, the more aggressive agency counsel should be in seeking a summary dismissal.

Regarding the second issue, agency counsel should check if ten days have passed since the protest was filed. Before moving for a summary dismissal for failing to provide the necessary facts, agency counsel should keep in mind that the GAO might allow the protester to supplement his protest within ten days of filing his protest.<sup>51</sup>

#### *Is the Protester an “Interested Party?”*

Another important point agency counsel should consider early in the agency’s response is whether the protester is an interested party.<sup>52</sup> The GAO considers the interested party determination as an essential element in all protests,<sup>53</sup> and absent this showing, the protest may be dismissed. To evaluate

whether a protester is an interested party, agency counsel should apply one of two tests. The first test applies before bid opening, and the second applies afterward.<sup>54</sup>

Before bid opening, the GAO will consider protests from *prospective* bidders who have a direct economic interest in the contract and have expressed an interest in competing for the contract.<sup>55</sup> The term “prospective bidder” means a potential competitor for the type of work being procured.<sup>56</sup> For example, in *Total Procurement Services, Inc.*,<sup>57</sup> the GAO dismissed the protest because the protester “[failed to demonstrate that it was] a ‘prospective bidder . . .’ with a sufficient direct economic interest in the Request For Quotations (RFQ) to be considered an interested party.”<sup>58</sup> The RFQ solicited medical and computer equipment. Total Procurement Services (TPS) provided information from electronic government solicitations to businesses registered to do business with the government, and then submitted quotes to the government on behalf of these enterprises, but TPS did not trade, sell, or service medical or computer equipment itself. The GAO rejected TPS’s argument that the GAO should consider anyone who takes the steps necessary to compete as an interested party. Instead, it ruled that TPS was not an interested party because TPS did not have the capability, intent, or past performance to execute this contract.<sup>59</sup>

After bid opening, the GAO only considers protests from *actual* bidders with a direct economic interest in the contract.<sup>60</sup> Actual bidders are those bidders who: (1) have submitted a bid; and (2) are next in line to receive the contract<sup>61</sup> if the protest succeeds.<sup>62</sup> If the protester does not satisfy these two elements, the agency attorney should seek to dismiss the protest.

51. See 4 C.F.R. § 21.2.

52. An interested party is “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” *Id.* § 21.0(a).

53. Total Procurement Servs., Inc., Comp. Gen. B-272343.2, Aug. 29, 1996, 96-2 CPD ¶ 92, at 3 (citing 4 C.F.R. § 21.1(c)(5) 1996)).

54. For purposes of this article, the terms “bid opening” and “receipt of proposal date” are the same.

55. 4 C.F.R. § 21.0(a) (LEXIS 2002).

56. See Tumpane Servs. Corp., Comp. Gen. B-220465, Jan. 28, 1986, 86-1 CPD ¶ 95, at 2.

57. 96-2 CPD ¶ 92.

58. *Id.* at 4. Protesters have the burden to “[s]et forth all information establishing [they are] interested part[ies].” 4 C.F.R. § 21.1(c)(5).

59. *Total Procurement Servs.*, 96-2 CPD ¶ 92, at 3-5.

60. 4 C.F.R. § 21.0.

61. A second-rated protester is almost always next in line to receive award when it protests. Protesters ranked third or higher, however, can also be next in line to receive the contract if their protests demonstrate how and why they will receive award ahead of the higher-ranked offerors.

62. See, e.g., Tulane Univ., Comp. Gen. B-259912, Apr. 21, 1995, 95-1 CPD ¶ 210 (protest dismissed—protester not an interested party because second-ranked entity would receive award even if the protester, the third-ranked entity, succeeded with its protest); SouthWest Critical Care Assocs., B-279773, 1998 Comp. Gen. LEXIS 252 (July 16, 1998) (protest denied—protester not an interested party because two entities stood between the awardee and the protester if protester’s challenge succeeded).

Sometimes, in addition to the agency and the protester, a third party will intervene in a protest. After the award has been made, an awardee may intervene in a protest to protect its interests. Pre-award, “all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied” can intervene.<sup>63</sup>

Intervenors often enter a protest in support of the agency to protect an award either made to them or for which they are in line to win.<sup>64</sup> Intervenors are helpful to agency counsel because intervenors can supplement the government’s position and make their counsel available to the agency attorney. The synergistic effect can be tremendous when the intervenor and the agency share the same position.

There is a catch, however. The government’s position is to secure an award that is in the best interest of the government and that comports with regulations. The awardee’s interest is making a profit, maintaining the status quo, and keeping the award. If the GAO rules in favor of the protester and against the intervenor, the intervenor can quickly become the government’s adversary. For this reason, agency counsel should always maintain a guarded relationship with the intervenor’s counsel, sharing only public information. The intervenor may later use any shared information against the agency, particularly legal or contracting strategy. The more sensitive the information shared, the more difficult it could be for the government to defend a protest lodged later by the intervenor.

#### *Has the Protester Demonstrated Prejudice?*

Demonstrating how the agency prejudiced the protester is another essential element the protester must establish.<sup>65</sup> The GAO regularly stresses the importance of establishing preju-

dice in a successful protest.<sup>66</sup> Thus, the agency attorney should always review protests for a clearly articulated statement showing exactly how the agency prejudiced the protester. If the protester does not make this showing, the agency attorney should move to dismiss the claim.

To determine prejudice, the GAO will look at whether the protester demonstrated a reasonable possibility that it was prejudiced by an agency’s improper actions. In other words, “but for the agency’s actions, would [the protester] have had a substantial chance of receiving the award[?]”<sup>67</sup> For example, in *Minolta Corp. v. Department of the Treasury*,<sup>68</sup> the GAO found that the agency prejudiced Minolta when it solicited a contract for nationwide copying services and then tried to award the contract under a pre-existing General Services Administration (GSA) contract. The GAO reasoned that because the new contract was an out-of-scope change to the GSA contract, the agency’s actions prejudiced Minolta; that is, Minolta had a reasonable chance of receiving the contract but for the agency’s improper use of the GSA contract.<sup>69</sup>

The cumulative effect of many minor agency errors can also constitute prejudice to a protester. In *CRAssociates, Inc.*,<sup>70</sup> the GAO concluded that the combined effect of the agency’s technical evaluation errors—such as failing to conduct meaningful discussions, making mathematical errors when scoring CRAssociates’ proposal, and not properly substantiating CRAssociates cost/technical tradeoff rationale—prejudiced the protester.<sup>71</sup> The GAO stated that although none of the deficiencies standing alone warranted sustaining the protest, “the cumulative effect of these shortcomings call[ed] into question the reasonableness of the evaluation and the resulting [determination to award this contract to the protester’s competitor].”<sup>72</sup>

Finally, in *Johnson Controls World Services, Inc.*,<sup>73</sup> the GAO highlighted the need for successful protesters to establish competitive prejudice, not simply to show that an agency failed to

63. 4 C.F.R. § 21.0(b).

64. GAO BID PROTEST GUIDE, *supra* note 3, at 20.

65. Sabreliner Corp., Comp. Gen. B-284240.2, B-284240.6, Mar. 22, 2000, 2000 CPD ¶ 68, at 10. “Prejudice is an essential element of every viable protest and our office will not sustain a protest if there is no reasonable possibility that the protester was prejudiced by the agency’s actions.” *Id.* (citing McDonald-Bradley, Comp. Gen. B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54, at 3).

66. See, e.g., *id.*; CRAssociates Inc., Comp. Gen. B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63, at 10.

67. Mech. Contractors, Comp. Gen. B-277916, Oct. 27, 1997, 97-2 CPD ¶ 121, at 6.

68. B-285010.2, 2000 Comp. Gen. LEXIS 141 (Sept. 26, 2000).

69. *Id.* at \*7.

70. Comp. Gen. B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63.

71. *Id.* at 4-10.

72. *Id.* at 4.

73. Comp. Gen. B-285144, July 6, 2000, 2000 CPD ¶ 108.

comply with a procurement regulation. In its protest, Johnson Controls alleged that the agency did not comply with commercial item procedures and improperly expedited the award process.<sup>74</sup> In denying the protest, the GAO noted that Johnson Controls did not demonstrate how the agency's decision to use commercial item procedures prejudiced its competitive position, stating that "[p]rejudice is an essential element of every viable protest and even where the record establishes a procurement deficiency, [the GAO] will sustain a protest on this basis only where it resulted in competitive prejudice."<sup>75</sup>

### *Should the Agency Take Corrective Action?*

After the agency counsel determines that the protest meets all essential jurisdictional elements, she must then decide which of the protester's allegations, if any, have merit. At this point, agency counsel must view the protest objectively and ask challenging questions. Since contracting personnel naturally believe they identified and corrected any shortcomings before placing the procurement "on the street," they may view the procurement with bias.

If any of the protest allegations are meritorious, the contracting office and agency counsel should consider taking corrective action. Corrective action is any effort the government can take to address shortcomings in the procurement, such as inconsistencies or ambiguous guidance, and includes anything from correcting a mistake in the bidding instructions to terminating the award and re-evaluating proposals.<sup>76</sup>

The timing of corrective action is important because it affects government liability. If the GAO determines that the government unduly delayed taking corrective action in the face of a clearly meritorious protest, it can hold the government lia-

ble for the protester's costs.<sup>77</sup> How much time constitutes "an undue delay" is a case-specific question of fact;<sup>78</sup> however, if the agency takes corrective action before the agency report submission date, generally it will not be liable for protest costs.

Finally, the protest must be "clearly meritorious." This means that either "the issue involved must not be a close question; [that is], the record . . . establishes that the agency prejudicially violated a procurement statute or regulation,"<sup>79</sup> or a "reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position."<sup>80</sup>

### **Competition in Contracting Act (CICA)<sup>81</sup> Stays**

A stay in proceeding with contract award or performance is a significant matter for the customer at the installation because it prevents commanders and soldiers from receiving needed services and supplies. When stays occur, commanders will inevitably ask their legal advisor what a stay is; how long the stay will last; why the stay was imposed; how a civilian contractor can stop the military from completing its mission; and most importantly, if there is a way to proceed despite the stay.

### *Background*

In pre-award protest situations, the CICA prohibits agencies from awarding a contract after receiving notice of a timely protest from the GAO.<sup>82</sup> This automatic stay is colloquially known as a "CICA stay." In post-award situations, the CICA requires agencies to suspend contract performance immediately when the agency receives notice of a protest from the GAO within ten days of the date of contract award or within five days after the

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74. *Id.* at 2-3.

75. *Id.* at 3.

76. *See, e.g.,* U.S. Property Mgmt. Serv., B-278727, 1998 Comp. Gen. LEXIS 99, at \*16 (Mar. 6, 1998) (recommending that the agency re-evaluate BAFOs and terminate the contract if the awardee was not the successful offeror after re-evaluation).

77. *See* 4 C.F.R. § 21.8(e) (LEXIS 2002). Protest costs include the costs of filing and pursuing the protest, attorney fees, expert fees, consultant fees, and bid and proposal costs. *Id.* § 21.8(d).

78. *See, e.g.,* Griners-A-One-Pipeline Servs., 1994 U.S. Comp. Gen. LEXIS 616, at \*7 (July 22, 1994) (after agreeing corrective action necessary, Army did not take such action until after compiling a report, submitting report to the GAO, and waiting two weeks; Army ordered to pay costs protester incurred because Army did not take corrective action immediately); Lynch Mach. Co., B-256279.2, 1994 Comp. Gen. LEXIS 590, at \*6-7 (July 11, 1994) (agency not required to pay protest costs after taking three months to investigate a highly technical protest issue and subsequently canceling contract to broaden competition; agency launched investigation immediately after learning of the issue and was responsive to protester's questions throughout investigation).

79. Millar Elevator Serv. Co., Comp. Gen. B-281334.3, Aug. 23, 1999, 99-2 CPD ¶ 46, at 2 (citing J.F. Taylor, Inc.—Costs, Comp. Gen. B-266093.3, July 5, 1996, 96-2 CPD ¶ 5, at 3; Tri-Ark Indus., Inc., Comp. Gen. B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101, at 3).

80. Minolta Corp.—Reconsideration, B-285010.2, 2000 U.S. Comp. Gen. LEXIS 141, at \*5 (Sept. 26, 2000) (citing The Real Estate Ctr.—Costs, Comp. Gen. B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105, at 3).

81. 31 U.S.C. §§ 3551-3356 (2000).

82. *Id.* § 3553.

date offered for the required debriefing.<sup>83</sup> If the requirement is of great importance to the agency, it can override the stay and proceed with contract award or performance.<sup>84</sup>

*When Must the Agency Suspend Contract Award or Performance, and When Can the Agency Override This Suspension?*

When determining whether a commander can proceed in the face of a stay, agency counsel should first consider two timing issues: (1) when the protest was filed; and (2) when the government received notice of the protest from the GAO. If both the filing of the protest and the GAO's notification of the protest occur *before* award, the agency may not award the contract until the GAO resolves the protest, or until "the head of the procuring activity [HPA] responsible for awarding the contract [determines, in writing], that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for the [GAO opinion]."<sup>85</sup> The agency must also advise the GAO of the HPA's finding.<sup>86</sup> This automatic stay rule can be triggered only after the GAO issues the notice of protest filing to the agency within the statutory timeframe.<sup>87</sup>

If the agency receives notice of the protest *after* contract award, but within ten calendar days thereafter, or within five calendar days after a debriefing date offered under a timely request, the agency must, upon receipt of that notice, immediately direct the awardee to cease performance under the contract.<sup>88</sup> The HPA can override this type of CICA stay under the

same conditions as overriding a pre-award stay, and must notify the GAO of such an override.<sup>89</sup>

Whenever protesters fail to comply with these strict time rules, they risk losing their opportunity to stay a contract award or performance. For example, in *Florida Professional Review Organization*,<sup>90</sup> the agency awarded its contract on June 17. Eight days later, on Friday, June 25, at 5:15 p.m., the protester filed its protest with the GAO. In accordance with the CICA, the GAO notified the agency of the protest within one working day. Because the next working day was Monday, 28 June, the agency did not receive GAO notice of the bid protest filing until eleven calendar days after contract award. As a result, the agency did not have to suspend performance.<sup>91</sup>

*When Can the Agency Override a Suspension of Performance?*

A CICA stay, therefore, is not a complete roadblock to fulfilling the commander's intent. However, just because the HPA responsible for awarding contracts decides to override the CICA stay does not mean the issue is over. If a protester disagrees with the override, it can use the Administrative Procedures Act (APA)<sup>92</sup> to request that a federal district court enjoin the agency from overriding the stay.<sup>93</sup> Under the APA, a district court can set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>94</sup> When evaluating overrides under the "urgent and compelling" standard, district courts tend to look at whether the type of work is urgently needed,<sup>95</sup> whether an incumbent con-

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83. *Id.* This suspension of performance is also known as an automatic stay.

84. *Id.* § 3553.

85. *Id.* § 3553(c). The agency must also allege that it will likely award the contract within thirty days after the HPA makes this finding. *Id.*

86. *Id.* § 3553(c).

87. *See, e.g.,* Techn. for Communications Int'l, Inc. v. Garrett, 783 F. Supp 1446 (D.D.C. 1992). In *Communications International*, the district court rejected the plaintiff's argument that its protest was timely filed because it notified the agency of the protest within ten calendar days of contract award. Considering the applicable statutory and regulatory language, the court determined that only the GAO notice to the agency matters when calculating whether the protester submitted its protest on time and the agency must stop contract award or performance. *Id.* at 1455.

88. 31 U.S.C. § 3553(d); FAR, *supra* note 40, § 15.506. To receive a debriefing, an offeror must request, in writing, a debriefing from the agency within three days after receiving notification of contract award. The agency should, to the maximum extent practicable, conduct the debriefing within five days after receiving the requester's request.

89. *See* 31 U.S.C. § 3553(d); U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP., pt. 33.104 (1996). Agencies must notify the GAO of their decision to override the stay before proceeding with contract performance. The GAO will not review the agency's decision to override the stay. 31 U.S.C. § 3553(d).

90. Comp. Gen. B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17.

91. *Id.* at 10-11 (citing BDM Mgmt. Servs., Comp. Gen. B-228287, Feb. 1, 1988, 88-1 CPD ¶ 93).

92. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (2000).

93. *See, e.g.,* Delta Dental Plan of California v. Perry, No. C95-2462 TEH, 1996 U.S. Dist. LEXIS 2086, at \*36, (N.D. Ca. Feb. 21, 1996). The statutory authority for U.S. District Courts to enjoin an agency from overriding a CICA stay, the Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491(b)(1) (2000), expired on 1 January 2001. *Id.* Whether U.S. district courts will continue to hear motions requesting temporary restraining orders (TROs) enjoining agencies from overriding CICA stays is currently unclear. Regardless, a protester can always request the Court of Federal Claims to issue a TRO enjoining the agency from overriding a CICA stay. *See id.*

tractor is available to perform the work during the stay,<sup>96</sup> whether the incumbent contractor is capable of satisfying the urgent need,<sup>97</sup> and the balance of harm to each party and the public.<sup>98</sup>

To override a CICA stay post-award, agencies have the option of using either the best interest of the government or the urgent and compelling standard. Since any matter that is urgent and compelling should necessarily also be in the best interest of the government, the latter test is easier to meet.<sup>99</sup> In light of this practical consideration, if a protester files for a TRO in district court, an attorney can reduce his agency's workload and anxiety level by helping the head of the contracting agency categorize a post-award CICA stay override decision as being in the government's best interest.

### Signing CICA Stay Overrides

Federal statute requires the head of the contracting activity (HCA) to sign a CICA stay override.<sup>100</sup> The signing of a determination and findings<sup>101</sup> authorizing an override by someone other than the HCA can create a challengeable issue. For example, in *Superior Engineering & Electronics Co. v. United States*,<sup>102</sup> the contracting officer requested that the HCA cancel an order to stop work. Because the HCA was unavailable, the Assistant Deputy Commander for Contract Management signed the determination and findings. The protester claimed that the contracting officer lacked the authority to cancel the work stop order because the FAR and the CICA require that the HCA make this finding. On review, the court noted that the government did not comply with the FAR and the CICA, but found that this noncompliance was not fatal. Stressing that the assistant was a Senior Executive Service employee, and that the contracting officer canceled the stop work order believing he

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94. 5 U.S.C. § 706(2)(A). Courts have interpreted this language of the APA "to mean that the disappointed bidder must demonstrate prejudice attributable to either (1) a violation of applicable statutes or regulations, or (2) an arbitrary or irrational decision of the procurement officers on matters primarily committed to his or her discretion." *Delta Dental Plan*, 1996 U.S. Dist. LEXIS 2086, at \*36 (construing 5 U.S.C. § 706).

95. See, e.g., *Litton Sys., Inc. v. Sec'y of Def.*, No. 88-0652, 1988 U.S. Dist. LEXIS 18673, at \*4, 6 (D.D.C. Mar. 14, 1988) (finding CICA override not irrational or arbitrary because agency critically needed night vision goggles (NVGs) to ensure the continuation of a safe mission, and because override avoided a significant delay in the lead-time necessary for increasing the production of NVGs during the next six to nine months).

96. See, e.g., *Taylor Group, Inc. v. Johnson*, 915 F. Supp. 295, 299 (M.D. Ala. 1995) (finding CICA stay unwarranted because the incumbent contractor/protester was ready, willing, and able to continue providing its services until the GAO resolved the protest issues, and the government had found protester's past performance acceptable).

97. See, e.g., *Superior Servs., Inc., v. Dalton*, 851 F. Supp. 381, 386 (S.D. Cal. 1994) (agency override reasonable and not arbitrary). *Superior Services* involved a small business set-aside contract for the collection and disposal of refuse and for pest control services. The protester could not satisfy contract requirements because it no longer qualified as a small business. The court agreed with the agency that these services were urgently needed and necessary for the health and safety of Navy personnel. *Id.*

98. See, e.g., *DTH Mgmt. Group v. Kelso*, 844 F. Supp. 251, 253-54 (E.D. N.C. 1993).

In evaluating a preliminary injunction motion, the [Court of Appeals for the] Fourth Circuit has adopted a "balance of hardships" approach employing four factors:

- (1) likelihood of irreparable harm to plaintiff without the injunction;
- (2) likelihood of harm to defendant with the injunction;
- (3) plaintiff's likelihood of success on the merits; and
- (4) the public interest.

The Fourth Circuit has stated that "the decision to grant or deny a preliminary injunction depends upon a 'flexible interplay' among the factors considered." For example, if plaintiff demonstrates that the first two factors are resolved in its favor, it is sufficient that "grave or serious questions" are raised affecting the merits. Conversely, a showing of strong probability on the merits will outweigh a showing of only "possible" irreparable injury to plaintiff. In all cases, the court should consider the public interest.

*Id.* at 253 (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 192 (4th Cir. 1977)).

99. See also *Universal Shipping Co. v. United States*, 652 F. Supp. 668, 673 (D.D.C. 1987) (stating courts should give substantial deference to an administrator's decision about what is in the best interest of the United States).

100. See 31 U.S.C. § 3553 (2000). "Head of the contracting activity" includes the official "who has overall responsibility for managing the contracting activity." FAR, *supra* note 40, § 2.101.

101. A "determination and findings" is a written document, prepared before an action is taken, explaining why the agency decided on the course of action. FAR, *supra* note 40, § 1.704. For the action to be legally sufficient, the installation contracts advisor must ensure that the determination and finding addresses all elements of the legal basis for the planned action.

102. No. 86-860-N, 1987 U.S. Dist. LEXIS 7940 (E.D. Va. Aug. 31, 1987).

had that authority, the court concluded that the agency did not arbitrarily and capriciously cancel the order.<sup>103</sup>

### Protective Orders

Sometimes business or agency records cannot be released to parties because the records are “protected information.” Examples of protected information include a business’s “proprietary or confidential data [and an] agency’s source-selection-sensitive information.”<sup>104</sup> To protect this information, and still allow parties to learn facts relevant to their protests, the GAO issues protective orders granting access to select persons. Protective orders “strictly control . . . access to protected material and how that material is labeled, distributed, stored, and disposed of at the conclusion of the protest.”<sup>105</sup>

While a protective order is in effect, only the GAO can authorize access to protected information. There are three general categories of officials authorized access: in-house counsel, retained counsel, and experts or consultants hired by a party participating in the protest.<sup>106</sup> Those officials participating in a company’s decision-making process are unlikely to gain access to protected information.<sup>107</sup> “Participating in the decision-making process” is a malleable term consisting of many factors, to include “whether the attorney’s activities, associations, and relationship with the client . . . involve advice and participation in any of the client’s decisions (such as pricing [and] product design) made in light of similar or corresponding information

about a competition.”<sup>108</sup> After hearing arguments from both sides, the GAO must decide whether the risk of inadvertent disclosure of proprietary or procurement-sensitive information outweighs the public policy of granting access to the protester’s representative.<sup>109</sup>

Pro se protesters will not gain access to a competitor’s protected information or the agency’s source-selection information.<sup>110</sup> The GAO will not risk providing pro se protesters a competitive advantage by granting them access to protected information.<sup>111</sup> To balance competing interests, the GAO will assist protesters with perfecting their appeals by authorizing access to their attorneys or consultants. Although forcing a small, family-owned business to hire a representative can impose financial hardship, this policy is the government’s attempt to safeguard confidential information while remaining open and forthcoming with industry.

When applying to the GAO for access to information under a protective order, parties must show that “they are not involved in the competitive decision-making [process] for any company that could gain a competitive advantage from [the protected information], and that there will be no significant risk of inadvertent disclosure of such information.”<sup>112</sup> Parties must also promise not to disclose the protected information to others.<sup>113</sup> If an attorney shares protected information with her client or anyone else not authorized access, the attorney can be sanctioned by the GAO,<sup>114</sup> investigated, and disciplined by her state bar.<sup>115</sup>

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103. *Id.* at \*27.

104. GAO BID PROTEST GUIDE, *supra* note 3, at 22 (citing 4 C.F.R. § 21.4).

105. *Id.*

106. GAO BID PROTEST GUIDE, *supra* note 3, at 23.

107. See, e.g., *Ralvin Pac. Dev., Inc.*, Comp. Gen. B-251283.3, June 8, 1993, 93-1 CPD ¶ 442, at 3 n.2. In *Ralvin Pacific*, the GAO denied two attorneys initially representing the protester access to protected information because of their involvement in an ongoing lease negotiation with the agency on behalf of the protester’s affiliate. Procedurally, both the agency and the awardee objected to these attorneys gaining access. *Id.*

108. *Mine Safety Appliances Co.*, Comp. Gen. B-242379.2, B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506, at 6 (citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)).

109. *Global Readiness Enter.*, Comp. Gen. B-284714, May 30, 2000, 2000 CPD ¶ 97, at 2 n.1.

110. 4 C.F.R. § 21.4. (LEXIS 2002).

111. GAO BID PROTEST GUIDE, *supra* note 3, at 22.

112. *Id.* at 23.

113. *Id.*

114. *GAO Sanctions 2 Attorneys for Violating Terms of Protective Order by Releasing Pricing Information*, 65 FED. CONT. REP. (BNA) 17 (1996). In 1996, the GAO sanctioned two attorneys for violating the terms of a protective order and releasing a competitor’s protected information. The GAO agreed that the disclosure was inadvertent, but still sanctioned each attorney because the disclosure affected the remedy in the case. The GAO sanctioned the attorney who released the information, and sanctioned her supervisor for inadequate supervision. The GAO prohibited both attorneys from accessing protected information for three months, admonished them, and required the attorneys to disclose their sanctions in all future applications for admission to materials under a protective order. *Id.*

115. 4 C.F.R. § 21.4(d).

The GAO determines those authorized to access protected information, and it will advise all parties concerned when it receives an application requesting access. Because the information does not belong to the GAO, the GAO relies on the parties involved in the protest to object to any improper person applying for access. Parties should file any objections quickly because the GAO will promptly decide the issue. If the GAO does not hear any objections within two days of receiving the application, it will authorize access. If an improper party gains access to protected information, however, agency counsel can still file a late objection and request that the GAO rescind its prior authorization. The GAO will also address this issue at once.<sup>116</sup>

In summary, agency counsel should ensure that the agency review each page of its report and that the agency withhold or redact all protected information. Counsel should also remind contracting personnel, on a routine basis, to inspect all documents for protected information every time they release information.<sup>117</sup> In addition, agency counsel should scrutinize anyone applying for access to protected information for disqualifying associations, relationships, or activities. The government should object to pro se protesters and representatives who participate in the protester's decision-making process gaining access to protected information. As a practical matter, the GAO usually does not need to admit agency counsel to a protective order because the agency should already have the disputed information.<sup>118</sup>

## **The Agency's Defense**

### *The Agency Report*

After reviewing all preliminary issues, agency counsel must plan the agency's defense strategy. This is when the true work begins. Two questions agency counsel must consider are: who will constitute the expert team needed to defend the protest, and what documents the agency needs to include in its report. Answering these questions early will make it easier for the agency to assert a successful defense.

### *Who Will Be on the Agency's Protest Team?*

Since each protest involves different facts and questions of law, the composition of protest teams will vary. Most protest teams, however, will include at least the following members:

- (1) Litigation attorney representing the agency before the GAO;
- (2) Field contract/installation attorney;
- (3) Contracting officer;
- (4) Contract specialist;
- (5) Program manager;
- (6) Contract evaluator(s); and
- (7) Source-selection authority.

To determine the composition of its team, agency counsel should consult with the installation contracting attorney and the contracting officer.

### *The Agency Administrative Report*

The agency's administrative report is the foundation for a thorough defense to a bid protest. All administrative reports should include the following:

- (1) Index;
- (2) Protest document;
- (3) Contracting officer's statement of facts;
- (4) Legal memorandum;
- (5) Solicitation with all amendments;
- (6) The protester's complete bid or proposal;
- (7) The awardee's complete bid or proposal;
- (8) All evaluation documents;
- (9) The abstract of bids and offers; and
- (10) Any other relevant document.<sup>119</sup>

Although agency reports have no required formats, they should present the materials in a manner that assists the GAO's review and presents the agency's actions in a favorable light. Installations should use the same format on every agency report. Consistency gives everyone involved predictability, and it helps successors prepare their first defense of a bid protest.

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116. GAO Bid Protest Guide, *supra* note 3, at 22.

117. Interview with Raymond Saunders, Deputy for Bid Protests, U.S. Army Contract Appeals Division, in Arlington, Va. (Mar. 16, 2001) [hereinafter Saunders Interview]. The Contract Appeals Division is the point of contact for most of the Army's contract litigation. One of Mr. Saunders's primary responsibilities is managing Army bid-protest litigation at the GAO. *Id.*

118. In addition, agency counsel have an independent obligation to safeguard protected information under the Procurement Integrity Act. *See* 41 U.S.C. § 423 (2000); 18 U.S.C. § 1905 (2000).

119. 4 C.F.R. § 21.3.

When organizing a report, the letter of protest should appear first since it contains the protest allegations. The GAO must know the protester's allegations up front to understand what the agency is refuting. The contracting officer's statement of facts should follow the letter of protest because the GAO needs to learn the facts as understood by the agency. The legal memorandum should be next because this document explains the agency's legal authority for taking the protested action. The remainder of the documents—clearly tabbed and organized—should appear in whatever order the protest team deems appropriate.

#### *The Contracting Officer's Statement of Facts*

The contracting officer's statement of facts is perhaps the most important document in the agency report. A well-written statement of facts is often the cornerstone of a positive, productive, and proactive relationship between the installation and the contract litigation attorney.<sup>120</sup>

The contracting officer, with her intimate knowledge of the facts, should lead the preparation of this document. The installation attorney should help the contracting officer develop facts that support the agency's legal defense. A well-written statement presents the facts chronologically, cross-references each fact to the agency report, directly addresses each allegation raised in the protest letter, and states each fact in simple terms. These measures will help the contract litigation attorney understand the case quickly, navigate through the voluminous case file efficiently, and litigate the protest in a fair and equitable manner for the installation.<sup>121</sup>

Perhaps the biggest challenge for agencies in defending bid protests is meeting short suspense dates. The entire agency report is due to the GAO within thirty days after the agency first receives telephonic notice of the appeal from the GAO.<sup>122</sup> Because of this, most contract litigation offices require agencies to produce their agency report within twenty days after receiving the GAO's notification. While complying with this requirement, the contracting officer and installation attorney should anticipate receiving phone calls from the contract litigation attorney assigned to the case. While the installation is busy preparing the agency report, the contract litigation attorney is

busy trying to learn the facts and legal issues involved in the protest.<sup>123</sup>

#### *The Legal Memorandum*

The installation attorney plays a crucial role in achieving a favorable disposition of a bid protest. A well-crafted legal memorandum, in conjunction with the contracting officer's statement, helps the contract litigation attorney understand the facts, the legal issues, and the agency's defenses. It also helps the contract litigation attorney understand the rationale for the installation's decisions.<sup>124</sup>

When drafting a legal memorandum, the installation attorney must work in tandem with the contracting officer. The attorney should ensure that the facts contained in the legal memorandum are consistent with the contracting officer's statement of facts, and must cross-reference the facts to the tabbed documents in the agency report. Furthermore, to provide a valuable platform for the contract litigation attorney to formulate the agency's defense, the legal memorandum should cite relevant GAO opinions in support of the agency's actions.<sup>125</sup>

While drafting documents and compiling the agency report with the contracting officer, the installation attorney must stay objective and remain alert to the need for corrective action. Not only can this save everyone work, as the contract litigation attorney will raise the need for corrective action with the installation after reviewing the agency report, it may also save the agency money.<sup>126</sup>

#### **Comments on the Agency Report**

After submitting the agency report, agency counsel should determine if the protester or any intervenors filed written comments on the report. Protesters can file written comments based on their review of the agency's defense. Agency counsel must track the timeliness of protesters' responses because a protest can be dismissed if the protester fails to do any of the following within ten days of receiving the agency report:

- (1) File written comments to the report;

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120. Saunders Interview, *supra* note 117.

121. *Id.*

122. 4 C.F.R. § 21.3(c).

123. Saunders Interview, *supra* note 117.

124. *Id.*

125. *Id.*

126. *Id.*

- (2) Request that the case be decided on the existing written record; or
- (3) Request a time extension.<sup>127</sup>

The protester or intervenors must provide copies of their comments to all parties no later than the day after the GAO receives their comments.<sup>128</sup>

### The Hearing

The GAO conducts hearings to “examine testimony of relevant witnesses, [to measure their] credibility, and to resolve factual disputes.”<sup>129</sup> Any party participating in the protest, to include the GAO, can request a hearing. All hearing requests must explain why the hearing is required, and should be detailed and clearly articulate every issue.<sup>130</sup>

Parties should not presume that the GAO will conduct a hearing; the GAO has complete discretion over whether to conduct one.<sup>131</sup> “Because hearings increase the costs and burden of protests, [the] GAO holds hearings only when necessary.”<sup>132</sup> Generally speaking, the GAO will conduct hearings when: (1) it cannot resolve a factual dispute between the parties without oral testimony; (2) assessing witness credibility is necessary; or (3) “the issue is so complex that proceeding with supplemental written pleadings clearly constitutes a less efficient and burdensome approach than developing the protest record through a hearing.”<sup>133</sup> For example, in *Allied Signal, Inc.*,<sup>134</sup> the GAO conducted hearings because the GAO attorney needed assis-

tance in understanding the complex electronic signal information involved in the protest.<sup>135</sup>

The GAO may grant a request in full or in part.<sup>136</sup> If the GAO grants a request, it will usually hold a pre-hearing conference to clarify procedural issues and substantive questions.<sup>137</sup> This allows the GAO to avoid “unduly disrupting or delaying the procurement process” as much as possible.<sup>138</sup>

The GAO will not conduct a hearing if the record is complete or unquestionable. The GAO will not delay procurements if witnesses are only going to reiterate protest issues, or to allow parties to engage in a discovery fishing expedition.<sup>139</sup> When the GAO allows a witness to testify, the witness must attend the hearing and answer all relevant questions. “If a witness . . . fails to attend the hearing, . . . [the] GAO may draw an inference unfavorable to the party for whom the witness would have testified.”<sup>140</sup>

### The Decision

#### *Protest Disposition*

The GAO must either dismiss, deny, or sustain a protest within 100 days after the protester filed his complaint.<sup>141</sup> “Dismissing” a protest is a favorable outcome for the government. The GAO dismisses a protest when it determines that the protest is without merit or is procedurally or substantively defective.<sup>142</sup> “Denying” a protest is also a favorable outcome for the government. The GAO denies a protest when, after reviewing

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127. 4 C.F.R. § 21.3(i).

128. GAO BID PROTEST GUIDE, *supra* note 3, at 31.

129. Soc. Sec. Admin., Comp. Gen. B-261226.2, Nov. 30, 1995, 95-2 CPD ¶ 245, at 2 n.1 (citing *Town Dev., Inc.*, Comp. Gen. B-257585, Oct. 21, 1994, 94-2 CPD ¶ 155).

130. 4 C.F.R. § 21.7(a).

131. *Town Dev., Inc.*, 94-2 CPD ¶ 155, at 5.

132. GAO BID PROTEST GUIDE, *supra* note 3, at 33.

133. *Town Dev., Inc.*, 94-2 CPD ¶ 155, at 5.

134. Comp. Gen. B-275032, B-275032.2, Jan. 17, 1997, 97-1 CPD ¶ 136.

135. *Id.* at 6.

136. GAO BID PROTEST GUIDE, *supra* note 3, at 34.

137. See 4 C.F.R. § 21.7(b) (LEXIS 2002); *supra* text accompanying note 8.

138. *Town Dev., Inc.*, 94-2 CPD ¶ 155, at 5 (citing *Border Maint. Serv., Inc.—Reconsideration*, Comp. Gen. B-250489.4, June 21, 1993, 93-1 CPD ¶ 473).

139. *Id.*

140. 4 C.F.R. § 21.7(f).

141. *Id.* § 21.9.

the allegations and considering the evidence, it concludes that the government did not violate any procurement statute or regulation. After the GAO dismisses or denies a protest, the government can continue with the procurement.

“Sustaining” a protest is bad news for the government. The GAO sustains a protest when it agrees with the protester and determines that the government has violated a procurement statute or regulation.<sup>143</sup> If the GAO also finds that the violation prejudiced the protester,<sup>144</sup> the GAO will recommend appropriate action,<sup>145</sup> including any combination of the following options:

- (1) Refrain from exercising options under an existing contract;
- (2) Terminate [an existing] contract;
- (3) Re-compete the contract;
- (4) Issue a new solicitation;
- (5) Award [the contract] consistent with statute and regulation; or
- (6) Such other recommendation(s) the GAO deems necessary to promote compliance [with the CICA].<sup>146</sup>

Before advising the agency what corrective action it should take, the GAO is required to consider the following matters concerning the procurement:

the seriousness of the . . . deficiency, the degree of prejudice to other parties or the integrity of the [procurement process], the good faith of the parties, the extent of [contract] performance, the cost to the government, the urgency of the procurement; and the impact . . . on the agency’s mission.<sup>147</sup>

Finally, the GAO can only recommend, not order, that agencies implement their findings within sixty days of receiving the

GAO’s ruling.<sup>148</sup> The GAO therefore requires agencies to report their failure to implement the GAO’s findings to the GAO within five days after the sixty-day deadline has elapsed.<sup>149</sup> The GAO must report all such failures to Congress.<sup>150</sup> Because of the close scrutiny given GAO reports, installation and litigation contract attorneys should coordinate noncompliance decisions with their higher headquarters.

### *Obtaining a Copy of the GAO’s Decision*

If contracting personnel are anxious to learn about the status of a protest, they can call the GAO’s current bid protest status line at (202) 512-5436. Furthermore, the GAO generally posts decisions within twenty-four hours after the case is closed on its Web page—[www.gao.gov](http://www.gao.gov).<sup>151</sup>

### **Protest Costs**

As part of every successful protest, protesters likely will request reimbursement of their costs for pursuing the protest, attorney fees, and costs for preparing their bid or proposal.<sup>152</sup> This section of the article provides agency counsel with a few tips for monitoring a protester’s claim and ensuring the government only makes proper payments.

### *General Protest Costs*

To receive protest costs, protesters first have to file their claims, certified and documented, within sixty days of receiving the GAO’s recommendation that the agency pay such costs.<sup>153</sup> Agency counsel should monitor when the claim was received and keep in touch with the contracting representative responsible for paying the claim. If the protester fails to file within this sixty-day timeframe, the agency can potentially deny the claim with the support of the GAO.<sup>154</sup> Furthermore,

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142. *Id.* § 21.5.

143. GAO BID PROTEST GUIDE, *supra* note 3, at 37.

144. *See supra* notes 65-75 and accompanying text.

145. GAO BID PROTEST GUIDE, *supra* note 3, at 37.

146. 4 C.F.R. § 21.8(a).

147. *Id.* § 21.8(b).

148. 31 U.S.C. § 3554 (2000).

149. FAR, *supra* note 40, § 33.104(g).

150. 31 U.S.C. § 3554.

151. GAO BID PROTEST GUIDE, *supra* note 3, at 39.

152. *See* 31 U.S.C. § 3554 (c)(1). The test for paying costs is whether the costs were reasonably incurred in pursuit of the protest. *Commerce Land Title—Costs*, Comp. Gen. B-249969.2, Oct. 11, 1994, 94-2 CPD ¶ 131, at 2 (citing *Data Breed Decisions, Inc.—Costs*, Comp. Gen. B-232663.3, 89-2 CPD ¶ 538).

counsel should be wary of claims for interest because the government cannot pay interest on protest costs.<sup>155</sup>

## Attorneys Fees

Second, “[i]f the agency decides to take corrective action in response to a protest, [the] GAO [can still] recommend that the agency pay the protester the costs of filing and pursuing the protest, including attorney’s fees and consultant and expert witness fees.”<sup>156</sup> Under these circumstances, the protester must file its claims “within [fifteen] days after being advised that the contracting agency has decided to take corrective action.”<sup>157</sup> The GAO will consider awarding these costs when “the agency unduly delay[s] taking corrective action in the face of a clearly meritorious protest.”<sup>158</sup> What constitutes “unduly delayed” is a case-specific factual determination.<sup>159</sup>

Finally, if the parties cannot agree on a fair payment for fees and costs, the protester can ask the GAO to determine a fair amount.<sup>160</sup> When the GAO resolves disputes of this nature, the GAO will calculate an award equal to the expenses that a reasonable, prudent person would have incurred in a similar pursuit.<sup>161</sup>

Attorneys fees usually constitute the bulk of protest costs, and they can add up quickly. The GAO does not have a per se limit on the number of attorneys or attorney hours for which a successful protester can be reimbursed. Instead, the GAO looks at whether the claimed expenses are reasonable in relation to the protest.<sup>162</sup> The more complex the protest is, the more attorneys and attorney hours the protester can claim. Considering how much large firms bill, especially senior partners, failing to take corrective action can quickly cost the agency a lot of money.

Prevailing protesters are typically entitled to all attorneys fees incurred with respect to all protest issues pursued.<sup>163</sup> Although attorneys fees are usually not allocated between those issues on which the protester prevailed and those on which it did not, the agency should not accept legal bills blindly. If the protester litigates separate, distinct, and clearly severable issues so as to constitute a separate protest, the agency can deny payment for legal fees associated with those separate issues in which the government prevails.<sup>164</sup>

153. 4 C.F.R. § 21.8(f)(1) (LEXIS 2002). The GAO may deny a protester’s claim if the protester fails to substantiate its costs. See *A-1 Movers of America, Inc.—Costs*, Comp. Gen. B-277241.31, Aug. 2, 1999, 99-2 CPD ¶ 24, at 4.

154. See, e.g., *Aalco Forwarding, Inc.—Costs*, Comp. Gen. B-277241.30, July 30, 1999, 99-2 CPD ¶ 36. In *Aalco Forwarding*, the GAO supported the agency’s denial of the protester’s claim because the protester did not file his claim within sixty days, stating that “the [sixty-day] timeframe . . . was specifically designed to avoid a piecemeal presentation of claims and to prevent unwarranted delays in resolving claims.” *Id.* at 4 (citing *HG Props. A. L.P.—Costs*, Comp. Gen. B-227572.8, Sept. 7, 1998, 98-2 CPD ¶ 62, at 2). The GAO also stated that a “failure to file an adequately supported claim in a timely manner results in forfeiture of a protester’s right to recover costs.” *Id.* For each expense, claims must identify the amount claimed, the purpose, and how it relates to the protest. *Id.*

155. See *Techniarts Eng’g—Costs*, Comp. Gen. B-234434, Aug. 24, 1990, 90-2 ¶ 152, at 7 (citing *Ultraviolet Purification Sys., Inc.—Costs*, Comp. Gen. B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376).

156. 4 C.F.R. § 21.8(e).

157. *Id.*

158. *Oklahoma Indian Corp.*, Comp. Gen. B-243785.2, June 10, 1991, 91-1 CPD ¶ 558, at 2.

159. *Id.*

160. 4 C.F.R. § 21.8(f)(3).

161. See *Pulau Elects. Corp.—Costs*, Comp. Gen. B-280048.11, July 31, 2000, 2000 CPD ¶ 122, at 11 (citing *Main Bldg. Maint., Inc.—Costs*, Comp. Gen. B-260945.6, Dec. 15, 1997, 97-2 CPD ¶ 163, at 10).

162. See, e.g., *id.* at 6; *JAFIT Enters., Inc.*, Comp. Gen. B-266326.2, Mar. 31, 1997, 97-1 CPD ¶ 125, at 3. In *Pulau Electronics*, the agency, relying on a Defense Contract Audit Agency (DCAA) audit, denied the protester’s claim seeking reimbursement for 1086.25 hours of attorney time. The agency considered the claim excessive and an unreasonable duplication of effort. On appeal, the GAO examined the reasonableness of the attorney hours claimed to determine whether the claim exceeded, in nature and amount, what a prudent person would incur in pursuit of her protest. After reviewing the protester’s detailed claim, the GAO recommended that the agency reimburse the protester for most of the attorney hours. The GAO concluded that the protester’s thorough claim did not indicate a duplication of effort, determined that it was reasonable for five attorneys to work on a substantively and procedurally complex protest, and found that the agency misplaced its reliance on DCAA’s audit findings. *Pulau Elects. Corp.*, 2000 CPD ¶ 122, at 4-11.

When evaluating reasonableness, the GAO generally considers the amount claimed for attorney fees to be reasonable when the hourly rate is similar to those charged by similarly situated attorneys, the hours are properly documented, and the bill does not appear to be excessive. The GAO also generally accepts the number of attorney hours claimed unless it can identify specific hours it considers excessive. *Techniarts Eng’g—Costs*, Comp. Gen. B-234434.2, Aug. 24, 1990, 90-2 CPD ¶ 152, at 3-4.

163. *Minolta Corp.—Costs*, B-285010.2, 2000 Comp. Gen. LEXIS 141, at \*9 n.2 (Sept. 26, 2000) (citing *Real Estate Ctr.—Costs*, Comp. Gen. B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105, at 5 n.2).

## Alternative Dispute Resolution (ADR) Techniques: Negotiation Assistance and Outcome Prediction

To reduce the time and expense associated with bid protests,<sup>165</sup> the GAO offers two ADR programs: negotiation assistance and outcome prediction.<sup>166</sup> Although neither program is binding on the parties, the GAO offers these ADR options with the hope that parties will voluntarily take action to end the case. For example, a successful ADR hearing could help encourage an agency to take corrective action voluntarily, or it could persuade a protester to “[withdraw voluntarily] the protest, request for reconsideration, or cost claim.”<sup>167</sup>

### *Negotiation Assistance*

The GAO offers negotiation assistance when the parties “have a realistic chance of reaching a ‘win-win’ solution.”<sup>168</sup> Typically, these cases involve two parties and arise in cost claims or protests that challenge the terms of a solicitation.<sup>169</sup> Any party, including the GAO attorney assigned to the case, can suggest using negotiation assistance. The final decision to use negotiation assistance, however, rests with the GAO.<sup>170</sup>

After the parties agree to proceed with negotiation assistance,

the GAO attorney will explain the ground rules and ensure that the parties agree to them before moving forward. Basically, those ground rules are that the GAO attorney handling the case will act as facilitator, that any settlement will be voluntary, that [the] GAO will not “sign off” on or otherwise review

any settlement, and that, if ADR fails, the same attorney will draft the decision.<sup>171</sup>

During the ADR proceeding, the GAO attorney will likely explain the strengths and weaknesses of the parties’ positions, and will encourage the parties to identify issues and possible resolutions jointly. Notably, though, the use of negotiation assistance ADR does not toll the 100-day CICA deadline.<sup>172</sup>

### *Outcome Prediction*

In outcome prediction, “the GAO attorney tells the parties what she . . . believes is the likely outcome of the case.”<sup>173</sup> Unlike negotiation assistance, outcome prediction is not a win-win situation. Thus, cases best suited for this type of ADR are those in which the outcome is certain. Cases of first impression are the worst candidates for outcome prediction ADR.<sup>174</sup>

Although the parties learn in advance how the GAO attorney will rule, some parties, such as an incumbent contractor who will lose the contract when the GAO issues its decision, will insist on a written opinion, regardless of the outcome. Other parties, hoping the GAO attorney changes her mind or that the Comptroller General will issue a contrary written finding, may also request a written opinion.<sup>175</sup>

The GAO can use outcome prediction for an entire protest, or it can use it for select issues within a multiple-issue case. In either situation, since the GAO must understand the positions of each party before predicting an outcome, the protester will get the opportunity to respond to the agency report before the GAO attorney invokes outcome prediction.<sup>176</sup>

164. Price Waterhouse, Comp. Gen. B-254492.3, July 20, 1995, 95-2 CPD ¶ 38, at 3.

165. *GAO’s Use of “Negotiation Assistance” and “Outcome Prediction” as ADR Techniques*, 71 FED. CONT. REP. (BNA) 3 (1999) at 1. The GAO averages seventy-seven days to issue a bid protest decision in which an agency report was filed. *Id.*

166. *Id.* at 2. With respect to bid protests, the GAO defines ADR “as a procedure designed to resolve a dispute more promptly than through issuance of a written decision.” *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 3.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 4.

176. *Id.*

## Conclusion

Bid protests in which the protester is successful can have a dramatic effect on an installation or a procuring agency. On the other hand, bid protests in which the government prevails can amount to nothing more than a mere speed bump in the road to a successful acquisition. The differences between these two situations are precisely why it is so important for attorneys to work closely with their contracting office, take an active role in the planning of an acquisition and, when necessary, defend the acquisition. Attorneys who scrutinize acquisition plans and solicitations objectively for inconsistencies, ambiguities, and other protest issues will help their commands acquire goods and services quickly and serve as invaluable and proactive assets to their contract litigation teams. These efforts will help avoid bid protests.

Unfortunately, even the best planning will not prevent some protests. Unsuccessful contractors, fighting for missed business opportunities, will inevitably file protests. Because of this reality, contract attorneys should always approach acquisition planning aggressively. This will increase the government's chances of prevailing at the GAO, and will greatly reduce the stress and time associated with bid protests.

Responding to a bid protest is a team effort. Agency counsel should always work closely with contracting personnel and installation attorneys since they are more familiar with the procurement. When an agency counsel blends her knowledge of the law with the contracting office's technical knowledge of the procurement, she will find that responding to a bid protest can be a creative, educational, and rewarding experience that still allows her to get home at a reasonable hour.

# TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

## Legal Assistance Note

### **“As Is”—Four Letters, Two Words Your Client Didn’t Bother to Read or Understand**

You are sitting at your desk when your client, Private First Class (PFC) FastCar, walks in. He just completed advanced individual training and, with money to burn, purchased a 1996 fire-engine red Ford Mustang convertible from the local used-car dealership. Private First Class FastCar tells you what a good deal he got on the car. The dealer told him, “This car is what a car should be, and it can be yours for only \$300 a month!” The dealer also said, “Although it is an ‘as is’ sale, the car comes with a one month, 50-50 warranty.”<sup>1</sup> You ask PFC FastCar what brings him into your office. He tells you “the car won’t run” and that he does not have the \$1000 the dealer wants to fix it. FastCar says he took the car to another mechanic, who said the car previously had been wrecked and sold for salvage, and is now probably unsafe to drive. FastCar does not want to continue paying for the car and wants you to get him out of the deal. What do you do?

Used car purchases are often the bane of a legal assistance attorney’s existence. To assist soldiers with problems associated with such purchases, as in the above scenario, legal assistance attorneys must have a basic understanding of general warranty law. The basis of warranty law is that goods sold carry with them certain warranties as to their quality and performance, and that if the goods do not meet these standards, then the buyer has a remedy.<sup>2</sup> Therefore, the first step in any case in which the goods are non-conforming or defective is determining the warranties that came with the goods. The law recognizes two basic kinds of warranties: express and implied.

## Express Warranties

Express warranties are created affirmatively by the seller and are present to some extent in all transactions.<sup>3</sup> An express warranty may exist even if the seller did not intend to create such a warranty.<sup>4</sup> The benefit of an express warranty is that the seller cannot disclaim them.<sup>5</sup> Upon proving the existence of an express warranty, the buyer only needs to show the product’s failure to conform to the affirmation, promise, description, sample, or model to have a remedy under the Uniform Commercial Code (UCC).<sup>6</sup>

Section 2-313 of the UCC recognizes three types of express warranties the seller can create:

- (1) By an affirmation of fact or promise, which includes most things the seller says about the product;
- (2) By description of the goods, created by contract descriptions or pictorial descriptions made part of the basis of the bargain; and
- (3) By sample or model, which guarantees that the actual product purchased by the buyer will conform to the sample or model the seller showed the buyer or displayed at the store or lot as part of the basis of the bargain.<sup>7</sup>

The opening scenario only potentially raises the first type of express warranty, those created by the seller’s affirmation or promise. Two major issues surround such warranties: (1) whether the statement or promise is a fact rather than merely “puffing;” and (2) whether the statement is of a kind that reasonably could play a role in the buyer’s decision. The former is an objective standard of the capacity of the statement under the circumstances to reasonably play a role in the bargain, and

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1. A one-month 50-50 warranty means the dealer promises to repair the product for the first month, with the consumer paying half the cost of parts and labor and the dealer paying the rest. This warranty requires the consumer to take the car to the dealer to be serviced. *Most “50-50” Warranties Are Illegal*, NCLC REPORTS, Nov./Dec. 1999, at 9 [hereinafter *Deceptive Practices and Warranties*].

2. See generally U.C.C. art. 2 (LEXIS 2002) (adopted in some form in every state except Louisiana). The Uniform Commercial Code (UCC) is not completely uniform throughout the jurisdictions that have enacted it, so attorney’s must be familiar with the version adopted in their state. A good reference for the UCC and the cases reported under this statute is the Uniform Commercial Code Reporting Service available on Westlaw.

3. NATIONAL CONSUMER LAW CENTER, CONSUMER WARRANTY LAW § 3.1 (2d ed. 2001) [hereinafter *CONSUMER WARRANTY LAW*].

4. U.C.C. § 2-313 cmt. 3 (“[n]o specific intention to make a warranty is necessary”).

5. *Id.* § 2-316(1).

6. See *id.* §§ 2-313(1), -601, -608, -711.

7. *Id.* § 2-313(1)(a)-(c).

the latter is a subjective standard of whether the statement actually did play a role in the bargain.<sup>8</sup> “This car has never been wrecked” and “the car had only one owner” are examples of statements that courts have found express warranties by affirmation of fact or promise.<sup>9</sup>

The dealer’s statement to PFC FastCar that “[the] car is what a car should be,” however, is ambiguous in nature and communicates no fact or promise. Section 2-313(2), UCC, provides that “an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.”<sup>10</sup> Therefore, the dealer’s statement to PFC FastCar did not create an express warranty.

### Implied Warranties

If the seller does not create an express warranty, an implied warranty may still apply to the purchase. The UCC and common law create implied warranties irrespective of the seller’s actions or representations.<sup>11</sup> The UCC recognizes two types of these warranties: (1) the implied warranty of merchantability; and (2) the implied warranty of fitness for a particular purpose.<sup>12</sup> The implied warranty of merchantability is the most important warranty in the UCC, and is the focus of the remainder of this note.

Every contract for the sale of goods by a seller, so long as the seller is a merchant of goods of that kind,<sup>13</sup> contains a warranty that the goods shall be merchantable, unless otherwise excluded or modified.<sup>14</sup> The implied warranty of merchantability imposes a baseline standard—it promises that the goods are: (1) fit for the ordinary purpose for which they are used; and (2) can be used with reasonable safety, efficiency, and comfort.<sup>15</sup>

The seller can disclaim this warranty only under very restricted circumstances.<sup>16</sup> The seller can limit or disclaim the warranty only if he uses the language required by the UCC; unless the seller uses expressions similar to “as is” or “with all faults,” UCC section 2-316(2) states that the disclaimer must contain the word “merchantability.” The disclaimer must be conspicuous and available to the consumer before the contract is signed.<sup>17</sup> Whether the warranty disclaimer is conspicuous is a question of law for the court, and depends on the entire circumstances of the transaction,<sup>18</sup> including the location of the disclaimer in the contract, size and color of type, surrounding words, and the timing of the disclosure.<sup>19</sup> The question is objective: whether a “reasonable person” ought to have noticed the disclaimer. What the particular buyer noticed or read is less important than the type size of the disclaimer and its location in the contract.<sup>20</sup> In addition to the restrictions on disclaimers imposed by the UCC, about a third of the states have statutes that preclude or restrict a seller’s ability to disclaim implied warranties.<sup>21</sup>

The ability to disclaim the implied warranty of merchantability is also limited when a written warranty or service contract is provided. The Magnuson-Moss Warranty Act<sup>22</sup> (MMWA) states that when a supplier<sup>23</sup> provides a “written war-

8. See CONSUMER WARRANTY LAW, *supra* note 3, § 3.2.1.

9. See, e.g., *City Dodge, Inc. v. Gardner*, 208 S.E.2d 794 (Ga. 1974), *Rogers v. Crest Motors, Inc.*, 516 P.2d 445 (Colo. 1973).

10. U.C.C. § 2-313(2).

11. See CONSUMER WARRANTY LAW, *supra* note 3, § 1.7.1.1.

12. U.C.C. §§ 2-314, -315.

13. A “merchant with respect to the goods of the kind sold in the transaction” simply has a professional status as to a particular kind of goods. *Id.* § 2-104 cmt. 2.

14. *Id.* § 2-314.

15. See CONSUMER WARRANTY LAW, *supra* note 3, § 4.2.3.2.

16. *Id.* § 4.2.2.

17. *Id.* § 2-316(2).

18. See *id.* § 1-201(10) (defining “conspicuous”).

19. CONSUMER WARRANTY LAW, *supra* note 3, § 5.8.1.

20. See *id.*

21. See *id.* § 14.11 (providing a state-by-state summary of special rules that restrict disclaimers of used car warranties or set standards for the condition of used cars).

ranty” or enters into a “service contract,” and the MMWA otherwise applies, that party cannot disclaim implied warranties. Where a dealer offers a 50-50 or other written warranty, the MMWA prohibits the dealer from disclaiming implied warranties during the term of the written warranty.<sup>24</sup> Consequently, while the consumer must pay fifty percent of a repair under the written warranty, the consumer may be entitled to a warranty repair at no charge under the implied warranty of merchantability.

The MMWA does allow a supplier to limit implied warranties to the same duration as the written warranty;<sup>25</sup> however, if the dealer does not do so explicitly, then the implied warranty has no term limit whatsoever.<sup>26</sup> Typical 50-50 warranties never specify such a term limitation, so these warranties come with unlimited implied warranties of merchantability. For example, if a dealer attempts to sell a car “as is” with a one-month 50-50 warranty, as in PFC FastCar’s scenario, then the disclaimer of implied warranties is ineffective. The car comes with an unlimited implied warranty of merchantability because the seller specified no shorter term.<sup>27</sup>

The seller’s conduct may also invalidate an “as is” disclaimer. For example, the seller may attempt to divert the buyer’s attention from the disclaimer by treating the document as a mere receipt; by explaining that the document is “just a form from headquarters;” by admonishing the buyer that the contract is “just a bunch of legalese;” by discouraging the buyer from reading the contract by saying, “It’s just what we agreed on, don’t you trust me?;” by rushing the contract signing; or by

putting a hand over part of the contract during the signing, in an attempt to mislead the buyer. Such conduct should invalidate an “as is” disclaimer under the UCC.<sup>28</sup>

In used car sales, the Federal Trade Commission’s (FTC) Used Car Rule<sup>29</sup> imposes additional requirements for disclaimers to be conspicuous. The FTC requires the “as is” on the window form, although separate from the contract document, to be in large, boldface capital letters. The Rule requires the seller to post the window form on a window of the car, and also to give a copy of this form to the buyer.<sup>30</sup> Although the FTC Act does not provide a private right of action for a violation of an FTC Rule, the FTC interprets a violation of the Used Car Rule as an unfair and deceptive practice (UDAP).<sup>31</sup> The Rule also specifies certain used car sales practices as unfair or deceptive. Consequently, a violation of the FTC Rule should be a state UDAP violation.<sup>32</sup> A purchaser could also argue that a violation of the Used Car Rule automatically violates the MMWA, which does authorize a private action for damages and attorney’s fees.<sup>33</sup>

### Cancellation

When a warranty exists, either express or implied, and the goods or the seller’s conduct does not conform to the contract obligations, the buyer may seek to “cancel” the sale and to exchange the goods for the money paid. The buyer may cancel by either rejecting or revoking acceptance of the goods in a timely manner:<sup>34</sup> the buyer must reject soon after delivery, and must revoke soon after discovery of the nonconformity. In

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22. 15 U.S.C. §§ 2301-2312 (2000).

23. The UCC defines “supplier” as “any person engaged in the business of making a consumer product directly or indirectly available to consumers,” *id.* § 2301(4), and therefore includes both retailers and manufacturers.

24. Deceptive Practices and Warranties, *supra* note 1, at 9.

25. 15 U.S.C. § 2308(b).

26. *See id.*

27. *See* Deceptive Practices and Warranties, *supra* note 1, at 9.

28. *See id.* *See generally* U.C.C. §§ 2-316(3)(a) (LEXIS 2002) (providing for treating the disclaimer as invalid when “circumstances” dictate), 2-316(2) (provides for treating the disclaimer as invalid when it is not “conspicuous”), 1-203 (providing for treating the disclaimer as invalid when there is a violation of the good faith duty imposed in the UCC), 1-103 (providing for treating the disclaimer as invalid as a defense of mistake against the seller’s assertion of the disclaimer, as an equitable estoppel, or as unconscionable).

29. 16 C.F.R. § 455 (LEXIS 2002).

30. *Id.* § 455.2(a).

31. The UDAP statutes are state laws of general applicability that prohibit deceptive and often unfair practices. They usually provide strong remedies, such as attorney fees and multiple or minimum damages, and apply to oral misrepresentations, the failure to disclose material facts, and unfair practices irrespective of any contractual disclaimers or limitations or UCC restrictions on consumer warranty rights. *See generally* NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (5th ed. 2001) [hereinafter UDAP] (providing detail on UDAP statutes, including summaries of every state’s statute, and analysis of scope, remedies, and litigation issues).

32. *See* CONSUMER WARRANTY LAW, *supra* note 3, § 14.7.8 (citing UDAP, *supra* note 31, § 3.4.4.5 (3d ed. 1991 and Supp.)).

33. 15 U.S.C. § 2310(d) (2000).

either case, the buyer must give the seller prompt notice. In addition, the buyer may have to provide the seller with the opportunity to remedy the nonconformity under either the statutory right to cure upon rejection or a contractual limitation on remedies.<sup>35</sup>

Generally, the buyer has four options regarding the goods after cancellation: (1) hold the goods until the seller picks them up; (2) return the goods; (3) sell the goods for the seller's account; or (4) continue to use the goods.<sup>36</sup> These options are cumulative with the buyer's right to damages and other remedies.<sup>37</sup> Whichever option the buyer exercises, he should have an expert inspect the goods at the earliest opportunity and get a signed list of problems. The buyer should have this done before returning or reselling the goods because this is his only opportunity to inspect the goods before others handle them.<sup>38</sup>

A buyer who cancels a sale should avoid using the goods because this can constitute a new acceptance. But what if continued use is unavoidable? Courts have demonstrated a willingness to approve the consumer's continued use of a car as long as the use is reasonable. The following are factors that courts consider when determining reasonable use:

(1) The instructions, if any, that the seller gave the buyer concerning the return of the goods when the buyer apprised the seller of his revocation of the goods;

(2) Whether the buyer's business or personal circumstances compelled the continued use;

(3) Whether during the period of such use, the seller persisted in assuring the buyer that all nonconformities would be cured or that provisions would otherwise be made to recompense the buyer for the dissatisfaction and inconvenience which the defects caused him;

(4) Whether the seller acted in good faith; and

(5) Whether the buyer's continued use unduly prejudiced the seller.<sup>39</sup>

To best protect the interest of the client who must continue to use the goods, his notice of rejection or revocation should state that until the seller returns the client's money, the client will continue to use the goods to preserve them, protect the client's security interest, and minimize the seller's damages. The notice should explain the client's poor financial circumstances and any other facts that require continued use of the goods. The notice should also state that the seller may remove the goods when he returns the client's payments.<sup>40</sup>

In PFC FastCar's scenario, continued use of the vehicle would be unwise because of the safety concern. Furthermore, continued use of the goods would undermine PFC FastCar's argument that the seller breached the implied warranty of merchantability.

## Conclusion

Legal assistance attorneys must have a working knowledge of warranty law to assist clients with problems similar to PFC FastCar. A thorough client interview is the first step in evaluating and preparing a warranty case. The client should bring all documents—the contract, window sticker, advertisements, any warranties, owner's manual, repair orders, and any other paperwork—to the initial interview. Sometimes these documents have conflicting information regarding the description or vehicle identification number of the goods, the amount of the down payment, the warranties, disclaimers, or limitation of remedies. Glowing statements about the goods in advertisements may have influenced the buyer. Brochures may have created express warranties that the seller cannot disclaim.<sup>41</sup> In revocation cases, repair records are particularly important because the client must show he afforded the seller the opportunity to cure.<sup>42</sup>

Attorneys must also go behind the written documents, focusing on any oral statements made by the seller. To determine intent, the UCC gives effect to the true understandings and

34. U.C.C. §§ 2-601, -608 (LEXIS 2002). The nonconformity must substantially impair the value of the goods to the buyer, and the buyer must have been justifiably unaware of the nonconformity when he accepted the goods. CONSUMER WARRANTY LAW, *supra* note 3, § 8.3.1.

35. *See* CONSUMER WARRANTY LAW, *supra* note 3, § 8.1.

36. *See* U.C.C. §§ 2-602, -604, -608.

37. *See id.* § 2-711.

38. CONSUMER WARRANTY LAW, *supra* note 3, § 8.4.1.

39. *See* McCullough v. Bill Swad Chrysler-Plymouth, Inc., 449 N.E.2d 1289 (Ohio 1983).

40. *See* CONSUMER WARRANTY LAW, *supra* note 3, § 8.4.6.5.

41. *See* U.C.C. §§ 2-313, -316.

42. *See id.* § 2-608.

expectations of the parties, rather than relying exclusively on the writings. The meaning of a contract term, admissibility of oral statements made before the signing of the writing, and the validity of disclaimers all depend, in part, on the parties' understandings and expectations.

Legal assistance attorneys must understand warranty law to assist clients after the deal is done. In addition, the preventive law efforts of a legal assistance office should aim to educate soldiers about warranties before these soldiers make major purchases. Major Kellogg.

# The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

## Summary Court-Martial: Using the Right Tool for the Job

*It would seem inconceivable that a serious charge . . . would ever be prosecuted before a court which could impose maximum confinement at hard labor for only one month. But if that occurred, an accused so charged before a summary court-martial would no doubt be delighted at his good fortune.*<sup>1</sup>

### Introduction

Under the Rules for Courts-Martial (RCM),<sup>2</sup> commanders decide the level at which misconduct will be handled.<sup>3</sup> Much like operational rules of engagement, the standing guidance to commanders is to use the minimum force necessary to achieve a desired outcome.<sup>4</sup> To carry out their duties properly, commanders must know their available options when dealing with a range of Uniform Code of Military Justice (UCMJ) violations, from minor infractions to those of a more serious nature.

Summary courts-martial serve as an important bridge between nonjudicial punishment imposed by the commander and judicial proceedings.<sup>5</sup> The function of a summary-court martial is to promptly adjudicate minor offenses using a simple procedure.<sup>6</sup> The summary court-martial has been described as “speedier than a special court-martial, . . . a supercharged Article 15 that is dressed up in a courtroom.”<sup>7</sup>

A summary court is the lowest of three levels of courts-martial.<sup>8</sup> It lies between informal Article 15 procedures<sup>9</sup> and judicial procedures of general and special courts-martial.<sup>10</sup> Unlike the two higher levels of courts-martial, military judges never preside at summary courts.<sup>11</sup> Instead, one officer, usually a non-lawyer, presides as judge (ruling on issues of law) and jury (as finder of fact).<sup>12</sup> The summary-court officer has the responsibility to “thoroughly and impartially” inquire into both sides of the matter.<sup>13</sup> Although the accused does not have the right to representation by defense counsel, the summary-court officer is charged with ensuring that the “interests of both the government and the accused are safeguarded” and that justice is done.<sup>14</sup> In this respect, the summary-court officer acts not only as judge and jury, but also as the prosecutor and defense counsel.

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1. *Middendorf v. Henry*, 425 U.S. 25, 40 n.17 (1976) (Rehnquist, J.) In *Middendorf*, enlisted Marines brought a class action challenging the authority of the military to try them at a summary court-martial without providing counsel. Finding that a summary court-martial occupies a position between informal nonjudicial disposition under Article 15 and the courtroom-type procedure of general and special courts-martial, the Supreme Court held that “a summary court-martial is not a ‘criminal prosecution’ for purposes of the Sixth Amendment.” *Id.* at 42.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. (2000) [hereinafter MCM].

3. *Id.* R.C.M. 306.

4. *See id.* R.C.M. 306(b); *see also* U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 3-2 (20 Aug. 1999) [hereinafter AR 27-10] (“A commander should use nonpunitive measures to the fullest extent to further the efficiency of the command.”).

5. *See* MCM, *supra* note 2, pt. II, ch. XIII; *see also id.* app. 9.

6. *Id.* R.C.M. 1301; *see also* U.S. DEP’T OF ARMY, PAM. 27-7, GUIDE FOR SUMMARY COURT-MARTIAL TRIAL PROCEDURE (15 Apr. 1985) (providing guidance on availability of witnesses, arranging the room for trial, scripts for informing the accused of his rights, acceptance of guilty pleas, and trial on merits and sentencing).

7. Michael H. Gilbert, *Summary Courts-Martial: Rediscovering the Spumoni of Military Justice*, 39 A.F. L. REV. 119 (1996).

8. *See* UCMJ art. 16 (2000).

9. *See* *Middendorf v. Henry*, 425 U.S. 25, 31-32 (1976) (noting that Article 15 punishment, conducted personally by the accused’s commanding officer, is an administrative method of dealing with most minor offenses).

10. *Id.* at 31.

11. Compare UCMJ art. 16(3), with *id.* art. 16(1)-(2). Rule for Courts-Martial 1301(a), however, allows for a military judge to preside over a summary court. *See* MCM, *supra* note 2, R.C.M. 1301(a).

12. UCMJ art. 16(3).

13. MCM, *supra* note 2, R.C.M. 1301.

14. *Id.* R.C.M. 1301.

## Who May Convene Summary Courts-Martial

Any officer who may convene a general or special court-martial may also convene a summary court-martial;<sup>15</sup> however, most summary courts in the Army are convened by battalion commanders.<sup>16</sup> Although not vested with the power to convene general or special courts, battalion commanders can gain the authority to convene summary courts from their general court-martial convening authorities (GCMCAs).<sup>17</sup>

In addition to those empowered to convene general or special courts, the commanding officer of a *detached* company may also convene summary courts-martial.<sup>18</sup> A GCMCA can designate subordinate commanders of *detached* units to convene summary courts within their command.<sup>19</sup> The RCMs define *detached* in terms of discipline rather than in a tactical or geographic sense, with the GCMCA deciding whether a unit is “separate or detached.”<sup>20</sup> Therefore, if the GCMCA decides to hold his battalion commanders “primarily responsible for discipline” within their battalions,<sup>21</sup> the units are “detached” and the battalion commanders are convening authorities empowered to refer cases to summary courts-martial.<sup>22</sup>

Normally, such GCMCA designations are found in local supplements to *Army Regulation (AR) 27-10*. Arguably, as long as a GCMCA is aware that his battalion commanders are exercising the authority to convene summary courts,<sup>23</sup> and the

GCMCA does nothing to prevent this, the GCMCA has de facto “separate” battalions.<sup>24</sup> The best practice, however, is to include this designation in the local *AR 27-10* supplement.

Summary courts-martial have worldwide jurisdiction over all persons subject to the UCMJ except officers and cadets, and may hear any UCMJ violation except capital offenses.<sup>25</sup> Commanders decide whether alleged misconduct is “minor” and should be tried by a summary court. Commanders should base their decisions on the nature of the offense; the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record, and experience; and the maximum sentence authorized for the offense if tried by general court-martial.<sup>26</sup>

The maximum punishment a summary court-martial may impose on an accused is reduction to the lowest enlisted grade; forfeiture of two-thirds pay for one month; and either confinement for one month, hard labor without confinement for forty-five days, restriction for two months, or combinations thereof.<sup>27</sup> The maximum punishment a summary court can impose on those above grade E-4 is further limited.<sup>28</sup>

No one may be brought to trial before a summary court-martial absent his consent.<sup>29</sup> If an accused objects to trial by a summary court, the charges may be dismissed or the accused may face trial by special or general court-martial.<sup>30</sup> Special courts-martial typically try misdemeanor-type offenses, however,

15. See UCMJ art. 24.

16. See, e.g., MCM, *supra* note 2, app. 4 (Dep’t of Defense, Form 458, Charge Sheet (Aug. 1984) (battalion commander’s adjutant signs block 13 for the commander as receipt by summary court-martial convening authority)).

17. See UCMJ art. 24(a)(2); MCM, *supra* note 2, R.C.M. 1302(a)(2).

18. See UCMJ art. 24.

19. See *id.* art. 24(a)(2); MCM, *supra* note 2, R.C.M. 1302(a)(2).

20. See MCM, *supra* note 2, R.C.M. 504(b)(2)(B)(i).

21. *Id.* R.C.M. 504(b)(2)(A).

22. See UCMJ art. 24.

23. This should be the case, because battalion commanders generally “receive” charges as summary court-martial officers in cases later referred to special and general courts-martial. See, e.g., MCM, *supra* note 2, app. 4.

24. This argument draws support from historical practice within the Judge Advocate General’s Corps. See generally Memorandum, DAJA-CL, to LTC Green, Chief, CLD TJAGSA, subject: Summary Courts-Martial Convening Authority at Battalion Level (19 Mar. 1984) (“[I]n deciding Art. 69 petitions, [The Judge Advocate General of the Army] (TJAG) has repeatedly held that battalion commanders may convene [summary courts-martial]. This has also been the long-standing position of [the Criminal Law Division].”) (citing TJAG opinions from the fifties and sixties supporting this position) (on file with author).

25. UCMJ arts. 17, 20.

26. MCM, *supra* note 2, pt. V, ¶ 1e (Nonjudicial Punishment Procedure).

27. See UCMJ art. 20; MCM, *supra* note 2, R.C.M. 1301(d)(1)-(2); see also *id.* R.C.M. 1003(b)(5)-(7) (discussing combinations of confinement, hard labor without confinement, and restrictions).

28. See *supra* notes 45-46 and accompanying text.

29. See UCMJ art. 20; MCM, *supra* note 2, R.C.M. 1303.

under UCMJ, Article 19, they “have jurisdiction to try . . . any noncapital offense.”<sup>31</sup> Their maximum punishments include a bad-conduct discharge, reduction to the lowest enlisted grade, confinement for one year, and forfeitures of two-thirds pay per month for one year.<sup>32</sup> Convening authorities usually reserve general courts-martial for the most serious, felony-type offenses. As the highest level of military trial courts, general courts-martial may adjudge the maximum punishment allowed for a particular offense—for example, death for murder.<sup>33</sup>

### Advantages of Trial by Summary Court-Martial

#### *Advantages to the Command*

Summary courts-martial are a great tool for commanders who consider an offense in the gray area between an Article 15 and a special court-martial. Because the proceeding is called a “court-martial,” and because a summary court may confine an enlisted soldier for up to thirty days, these proceedings are valuable when commanders want to teach a soldier a swift, harsh lesson that also serves as a strong message to others within their commands.

As discussed above, summary courts-martial in the Army are usually convened by battalion commanders.<sup>34</sup> These commanders normally appoint one of their subordinate officers to serve as the summary court-martial hearing officer. In most cases, this officer can notify the accused and try the case within a week. Compared to a special or general court-martial, this proceeding is very quick with fewer administrative burdens imposed on the unit. In addition, all post-trial matters—that is, clemency—are handled at the battalion level. Offenders submit any appeals directly to The Judge Advocate General, and therefore do not create extra work for the battalion commander’s superiors.<sup>35</sup>

#### *Advantages to the Accused*

A soldier would wisely consent to trial by summary court-martial for many reasons. First, this type of court can resolve the accusation quickly. Second, the soldier may plead guilty or not guilty, and the summary court-martial officer has the responsibility to “thoroughly and impartially” inquire into both sides of the matter.<sup>36</sup> Third, although soldiers do not have a right to representation by military defense counsel, they can consult with counsel before deciding whether to accept trial by summary court-martial. They may also hire civilian defense counsel to represent their interests before, during, and after the proceedings.<sup>37</sup> Fourth, the Military Rules of Evidence (MRE) apply throughout the proceeding. Fifth, the accused may call, question, and cross-examine witnesses for and against him. Finally, and in many cases most importantly, the maximum penalties at a summary court are much lower than those the soldier would face at trial by special or general court-martial.<sup>38</sup> A finding of guilty at a summary court-martial is not a federal conviction,<sup>39</sup> and soldiers found guilty do not face a punitive discharge as part of their sentence.<sup>40</sup>

### Disadvantages of Trial by Summary Court-Martial

#### *Disadvantages to the Command*

The main drawbacks to handling misconduct with a summary court-martial are the relatively low maximum penalties. If an enlisted soldier is “maxed-out” and given thirty days’ confinement, he will often return to duty in twenty-five days. The five-day reduction results from administrative “good time” credit confinees automatically receive from the confinement facility.<sup>41</sup> Furthermore, because summary courts cannot impose punitive discharges, the soldier remains in the unit. If discharge is appropriate, commanders must pursue administrative

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30. UCMJ art. 20.

31. *Id.* art 19.

32. *Id.* (as amended by Exec. Order No. 13,262, 2002 Amendments to the Manual for Courts-Martial, United States, 67 Fed. Reg. 18,773, 18,774 (Apr. 17, 2002)).

33. *Id.* art. 18.

34. See *supra* text accompanying notes 16-24.

35. See MCM, *supra* note 2, R.C.M. 1306.

36. *Id.* R.C.M. 1301(b).

37. *Id.* R.C.M. 1301(e). In rare cases, the accused may request representation by military counsel at the summary court-martial proceedings. The regional defense counsel may approve these types of requests. See *id.* R.C.M. 1301(e) discussion. More commonly, trial defense counsel “ghost write” motions and other documents for the accused soldier’s signature and prepare the accused to defend himself at the hearing. In contrast, only The Judge Advocate General may authorize a trial counsel to participate directly in the proceedings.

38. Compare *id.* R.C.M. 1301(d), with *id.* R.C.M. 1003.

39. See *Middendorf v. Henry*, 425 U.S. 25 (1976) (holding that summary courts-martial are not trials that trigger an accused’s Fifth or Sixth Amendment right to counsel).

separation in a separate proceeding in which either the brigade or division commander serves as the separation authority.<sup>42</sup>

Summary courts-martial can be unpredictable. The application of the MREs can create situations in which defense counsel play havoc with the proceeding—either directly or by ghost writing motions for the accused to present at trial. Take, for example, an accused facing trial for use of a controlled substance based on a positive urinalysis. The accused could accept a summary court-martial, plead not guilty, and then object to the admission of the litigation packet prepared by the laboratory. In this situation, the summary court-martial would need to produce someone from the laboratory to authenticate the litigation packet and provide expert testimony; alternatively, the summary-court officer can acquit the accused in lieu of producing the expert witness. This scenario, which has resulted in unjustified acquittals at various Army posts,<sup>43</sup> flies in the face of the President's intent that the proceeding "promptly adjudicate minor offenses using a simple procedure."<sup>44</sup>

Another disadvantage with summary courts concerns offenders above grade E-4. A summary court may only reduce a soldier above grade E-4 by one grade, and may not confine soldiers above grade E-4 or give them hard labor without confinement.<sup>45</sup> These additional limitations on maximum punishment may create an appearance, or the reality, of a double standard. As a practical result, noncommissioned officers (NCOs) face no greater punishment at a summary court-martial than what they would face at a field-grade Article 15 proceeding.<sup>46</sup>

Although a battalion commander may feel that an NCO does not deserve the harsh stigma of a federal conviction for his alleged misconduct, if the facts and circumstances demand some jail time, the commander has no option but to forward the preferred charges with a recommendation for at least a special court-martial. Because most brigade commanders do not exercise their authority to send cases to "straight" special courts-martial, this could result in trial by a special court-martial empowered to adjudge a bad-conduct discharge.

## *Disadvantages to the Accused*

An accused soldier may choose to turn down trial by summary court-martial for many valid reasons.<sup>47</sup> Summary courts have fewer procedural protections and, therefore, less due process throughout the proceeding. Also, as mentioned above, although the accused may hire a civilian attorney at his own expense and may elect to have a spokesperson to represent him at the proceeding, an accused at a summary court does not have the right to military counsel.<sup>48</sup>

A third problem for an accused stems from the convening authority's selection of a summary-court officer. When a battalion commander convenes a summary court, he often selects the unit's executive officer or S-3 to serve as the summary court-martial officer because in most units they are the only available field-grade officers. Despite the summary-court officer's responsibility to be impartial,<sup>49</sup> the accused may perceive that the officer's personal and professional loyalty runs directly to the convening authority. Reinforcing this perception is the fact that all post-trial matters, including final decisions about requests for clemency, rest with the battalion commander. This stands in stark contrast to a field-grade Article 15, in which a soldier can appeal the findings and punishments imposed at the battalion level to the brigade commander.<sup>50</sup>

## **Pretrial Agreements**

Commanders would, perhaps, send more serious cases to trial by summary court-martial if they could be assured that the accused would be separated from the military with an other than honorable (OTH) discharge once the accused had served his punishment.

By entering into a pretrial agreement with the accused, commanders may achieve this result. In other words, a pretrial agreement would permit a prompt adjudication of the offenses using the simplified summary court procedures; as part of the pretrial agreement, there would be a follow-on administrative separation proceeding, virtually guaranteeing the discharge. Of course, the accused must consent to this arrangement.<sup>51</sup>

40. MCM, *supra* note 2, R.C.M. 1301(d)(1). They may, however, face administrative separation under AR 635-200. See U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (1 Nov. 2000) [hereinafter AR 635-200].

41. See generally U.S. DEP'T OF ARMY, REG. 633-30, APPREHENSION AND CONFINEMENT: MILITARY SENTENCES TO CONFINEMENT (28 Feb. 1989).

42. See AR 635-200, *supra* note 40, para. 1-19.

43. For example, the author experienced this situation as a trial counsel at Fort Bragg, North Carolina.

44. MCM, *supra* note 2, R.C.M. 1301.

45. *Id.* R.C.M. 1301(d)(2).

46. Compare *id.* with *id.* pt. V, ¶ 5b(2).

47. Note, however, that when soldiers exercise their right to object to trial by summary court-martial, they most likely will face trial by special or general court-martial. See UCMJ art. 20 (2000); MCM, *supra* note 2, R.C.M. 1303.

## Conclusion

Convening authorities may agree to refer pending charges to a certain type of court-martial, to include summary courts-martial.<sup>52</sup> In exchange, an accused may promise to plead guilty, enter into a confessional stipulation, and fulfill additional terms not otherwise prohibited.<sup>53</sup> Specifically, an accused may enter into an agreement to waive administrative discharge proceedings, to include those associated with an OTH discharge.<sup>54</sup>

In the above scenario, the accused may consent to avoid the harsh stigma of a federal criminal conviction. The command may consent to achieve what has been called a “Chapter 10 plus”<sup>55</sup> or a “supercharged Charticle 29.”<sup>56</sup>

The summary court-martial, the lowest level of court-martial under the UCMJ, is an important command tool. Designed primarily for disposition of relatively minor offenses, it is a convenient bridge between nonjudicial punishment imposed by the commander and full judicial proceedings.

A summary court-martial is a “trial” in name only. Measured by constitutional due process standards, the proceedings fall well short of American expectations of criminal justice.<sup>57</sup> Military justice practitioners should bear in mind that although the proceeding may take place in a courtroom, a summary court in reality is a supercharged Article 15.<sup>58</sup> Given that all parties agree to dispose of the action at this level, the relatively low amounts of punishment involved, and the fact that a guilty finding is not a federal conviction, judge advocates should remind their commanders that trial by summary court-martial is a swift and fair option to address minor misconduct within their commands. Major Huestis.

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48. MCM, *supra* note 2, R.C.M. 1301(e).

49. *Id.* R.C.M. 1301.

50. *See* UCMJ art. 15(e).

51. *See* MCM, *supra* note 2, R.C.M. 705(c)(1)(A) (“A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.”), 1303 (“No person who objects thereto before arraignment may be tried by summary court-martial even if that person also refused punishment under Article 15 and demanded trial by court-martial for the same offense.”).

52. *Id.* R.C.M. 705(b)(2)(A).

53. *Id.* R.C.M. 705(b)(1).

54. *See, e.g.,* United States v. Gansemer, 38 M.J. 340 (C.M.A. 1993).

55. A discharge in lieu of court-martial, processed in accordance with AR 635-200, Chapter 10, normally results in an OTH discharge, but the accused avoids confinement and a federal conviction. *See generally* AR 635-200, *supra* note 40.

56. “Charticle 29” is slang for a separation action for misconduct under AR 635-200 paragraph 14 in conjunction with an Article 15. The exposure of an accused in the grade of E-4 or below to the possibility of thirty days’ confinement at a summary court supercharges the Charticle 29 scenario.

57. *See* Middendorf v. Henry, 425 U.S. 25 (1976).

58. *See generally* Gilbert, *supra* note 7.

## Note from the Field

### Child Support, Private Enforcement Companies, and the Law

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*Editor's Note: Child support issues are common problems encountered in legal assistance offices both in the United States and abroad. More and more of our soldiers are paying their child support or receiving their child support through private child support enforcement companies. This article addresses some problems associated with these companies.*

With over \$84 billion dollars of child support arrears owed nationwide,<sup>1</sup> any idea to collect those arrears is probably worth trying. For years, state agencies have been collecting both current child support and arrears, but many of these agencies have been criticized for their backlog of cases and minimal resources.<sup>2</sup> In an attempt to fill the gap between what is owed and what the states are collecting, various private child support enforcement<sup>3</sup> companies have sprung up over the past decade—with more than twenty major companies now in existence. While the efforts of some of these companies are laudable, there is a price: many of the contracts the custodial parents sign stipulate that between 25% and 33% or more of any money recovered is kept by the company, *even if a state agency col-*

*lected the money and it would be disbursed to the custodial parent at no charge.*<sup>4</sup> One company even asserts that if the non-custodial parent makes a support payment directly to the custodial parent, that money has to be turned over to the private company as well, so the company can extract its percentage, or the company will charge the custodial parent a penalty.<sup>5</sup>

While others have addressed whether using private child support enforcement companies is a good idea,<sup>6</sup> this note focuses on two main legal issues surrounding these companies: first, what types of support these companies can collect; and second, whether the support collected by state agencies can be sent to these companies instead of the custodial parent. Surprisingly, the answers to both questions are consistent throughout the United States: at most, only child support arrears and not current support may be collected by these companies, and money collected by state agencies may not be redirected to a private company.

### Current Versus Arrears

Only a few cases nationwide have dealt directly with the issue of what types of child support these companies may collect. In perhaps the most analyzed and quoted case, *Utah v. Sucec*,<sup>7</sup> the Utah Supreme Court examined the right of a private child support collection company to enforce an assignment of child support arrears received from the custodial parent. The court differentiated between current, on-going child support payments and child support arrears.<sup>8</sup> Unlike other debts, the

1. Office of Child Support Enforcement, *Child Support Enforcement (CSE) Background and Program Results* (Feb. 2000), at <http://www.acf.dhhs.gov/programs/cse/pubs/2000/datareport/ch01.html>.

2. This criticism has taken the form of lawsuits, see *Blessing v. Freestone*, 520 U.S. 329 (1997); *Child Support Collection Leads Divorced Fathers to Sue the State of Michigan*, Jan. 26, 2000, available at <http://law.about.com/library/weekly/aa012600a.htm>; congressional testimony, see *The Private Sector as a Partner in Solving the Child Support Crisis, Before the House Comm. on Ways and Means Subcomm. on Human Resources*, 104th Cong. (Feb. 6, 1995) (testimony of Richard Hoffman), available at [http://www.supportkids.com/content/public/news/coverage/testimony950206\\_pt1.asp](http://www.supportkids.com/content/public/news/coverage/testimony950206_pt1.asp); federal investigations, see Leon M. Tucker, *U.S. to Probe Child Support Collection*, TENNESSEAN, Dec. 15, 1999; and a variety of articles by the media, see, e.g., Mark Williams, *Company Offers Child Support Collection Service*, DAILY REP., Aug. 29, 1995; not-for-profit organizations, see Press Release, Children NOW, Past Due: Child Support Collection in California (1996), available at <http://www.childrennow.org/california/Csuppastdue/ChildSupport.html>; and the states themselves, see Bureau of State Audits and Little Hoover Commission, Executive Summary (May 1997), available at <http://www.lha.ca.gov/lhcdir/142es142.html>.

3. For purposes of this article, enforcement and collection are synonymous.

4. Laura Meckler, *A Growing Field, Private Child Support Collection Agencies Under Attack*, AP, June 12, 2002.

5. See Central Child Support Enforcement Agency, Exclusive Agency Contract para. 4, available at <http://www.childsupport.ws> (last visited July 1, 2002).

6. See, e.g., Better Business Bureau of New York, *Child Support Enforcement* (NYBBB1293), available at <http://www.newyork.bbb.org/library/publications/subrep71.html> (last visited Mar. 19, 2002); Press Release, National Organization for Women, Privatizing Child Support Collection a Truly Bad Idea: Statement of the National Organization for Women (May 18, 2000), available at <http://www.now.org/press/05-00/05-18-00.html>; Association for Children for Enforcement of Support, *ACES Members Report Being Ripped Off By Private Collectors*, at <http://www.childsupport-aces.org/beware.html> (last visited Mar. 19, 2002); Mark Williams, *Company Offers Child Support Collection Service*, DAILY REP., Aug. 29, 1995, available at <http://centralohio.thesource.net/Files/9508291.html>.

7. 924 P.2d 882 (Utah 1996).

8. *Id.* at 885-86. Current support is the support due to be paid in a given time frame; if it is not paid by the time the next payment is ordered to be paid, then the amount not paid becomes child support arrears. Only one payment due during that time frame may be designated "current support."

current, on-going obligation or duty to support a child is owed to the child, and not the custodial parent. The custodial parent cannot discharge, negotiate, or assign that on-going obligation.<sup>9</sup> Unlike the on-going obligation, however, child support arrears in some jurisdictions belong solely to the individual who provided the support to the child for the period current support was not being paid—the custodial parent.<sup>10</sup> Because this debt does not belong to the child in these jurisdictions, the custodial parent is free to discharge, negotiate, or assign that debt.<sup>11</sup> Accordingly, the court held that a private child support company may, at most, collect only child support arrears, and not current support.<sup>12</sup>

The underlying logic of this case's holding—that current child support belongs solely to the child and cannot be contracted or assigned away—is consistent throughout the nation among states which have addressed this issue.<sup>13</sup> Therefore, private companies in the United States may only legally collect child support arrears due to the custodial parent, and not current child support, despite many of the companies' assertions otherwise.

Even the ability of private companies to collect child support arrears may be limited in some jurisdictions where the child potentially has an independent right to collect the arrears owed,<sup>14</sup> which may empower the child to bring suit against any

party whose private child support collection fees reduce the amount of support due to the child.<sup>15</sup> Furthermore, due to the almost universal prohibition against contingency fees in domestic relations cases, attorneys working for private child support collection companies would be barred ethically from collecting child support (current or arrears) on any sort of contingency fee basis.<sup>16</sup> At least one jurisdiction has found that the payment of collection fees from the child support award, as required by the contracts used by many private child support collection companies, is void as against public policy.<sup>17</sup>

#### **State IV-D Agencies and Private Child Support Enforcement Companies**

Regardless of what type of support, if any, private child support enforcement companies may collect, if a custodial parent has an open case with a state IV-D agency,<sup>18</sup> the question remains, should the child support collected by the state agency be sent directly to the custodial parent or to the private company with which the parent has a contract? Under both federal and many state laws,<sup>19</sup> state agencies must distribute the child support they collect directly to either the family or the federal/state government,<sup>20</sup> and not to a third party.

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9. *Id.* at 885-86.

10. *Id.*; see *Washington v. Weimer*, 2001 Wash. App. LEXIS 2339 (Wash. Ct. App. Oct. 19, 2001).

11. *Sucec*, 924 P.2d at 885-86; see *In re Marriage of Searle*, 1999 Wash. App. LEXIS 944 (Wash. Ct. App. May 27, 1999) (holding the same as *Utah v. Sucec* that only child support arrears can be collected by a private company).

12. *Sucec*, 924 P.2d at 886.

13. See *Picket v. Brown*, 462 U.S. 1, 16 n.15 (1983); see generally *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614 (Va. Ct. App. 1989); *In re Marriage of Miller*, 790 P.2d 890 (Colo. Ct. App. 1990); *Payne v. Prince George's County Dep't of Soc. Serv.*, 67 Md. App. 327 (Md. Ct. Spec. App. 1986); *Bowen v. State*, 56 Ohio St. 235 (Ohio 1897); *In re Linville*, 2000 Tenn. App. LEXIS 787 (Tenn. Ct. App. Dec. 7, 2000); *Ellison v. Walter*, 834 P.2d 680 (Wyo. 1992); *Salter v. Salter*, 1993 Del. Fam. Ct. LEXIS 24 (Del. Fam. Ct. Apr. 2, 1993); *Hill v. Hooten*, 776 So. 2d 1004 (Fla. Dist. Ct. App. 2001); *Worthington v. Worthington*, 250 Ga. 730 (Ga. 1983); *Trunzler v. Trunzler*, 431 So. 2d 1115 (Miss. 1983); *Martinetti v. Hickman*, 261 N.J. Super. 508 (N.J. Super. Ct. 1993); *Dolhonde v. Dolhonde*, 357 So. 2d 810 (La. Ct. App. 1978); *Sorrell v. Bornder*, 593 So. 2d 986 (Miss. 1991); *Pascale v. Pascale*, 140 N.J. 583, 591 (N.J. 1995); *Shipman v. City of New York Support Collection Unit*, 183 Misc. 2d 478 (N.Y. Sup. Ct. 2000); *Toni v. Toni*, 2001 ND 193 (N.D. 2001); *Weimer*, 2001 Wash. App. LEXIS 2339, at \*1.

14. See generally *Amie v. Superior Court of Riverside County*, 99 Cal. App. 3d 421 (Cal. Ct. App. 1979) (quoting *Fagan v. Fagan*, 43 Cal. App. 2d 189 (Cal. Ct. App. 1941)); *Bantz v. Bantz*, 1993 Ohio App. LEXIS 740 (Ohio Ct. App. Feb. 10, 1993); *Commonwealth v. Johnson*, 7 Va. App. 614 (Va. Ct. App. 1989). While no cases have dealt directly with the issue of whether a child may bring suit on his behalf to collect child support arrears from the non-custodial parent, these cases support the proposition that children may do so.

15. *Sorrell v. Bornder*, 593 So. 2d 986 (Miss. 1991) (citing *Trunzler*, 431 So. 2d at 1115).

16. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5 (2002); *Davis v. Taylor*, 344 S.E. 3d 19 (N.C. Ct. App. 1986); *Law Office of Tony Center v. Baker*, 185 Ga. App. 809, 810 (Ga. Ct. App. 1988) (holding that in these jurisdictions, the custodial parent must pay up front for any collection services, and that the companies' fee may not be apportioned out of the support collected).

17. *Shipman*, 183 Misc. 2d at 478.

18. Named for the authorization to create state child support enforcement agencies found in section IV-D of the Social Security Act, 42 U.S.C. §§ 651-669 (2000).

19. See W. VA. CODE § 48-1-307(d) (2001).

20. For example, to reimburse public assistance, or to repay the costs of foster care.

Title 42 U.S.C. § 657, *Distribution of Collected Support*, provides that the state may only distribute support to the family, the federal government, or the state government. No provision is made for distribution to private companies.<sup>21</sup> The federal regulation enacting the statute, 45 CFR section 302.38, provides the same.<sup>22</sup> While Congress could have included third-party private companies as potential recipients of child support from the state, it did not. Rather, it clearly enumerated who may receive support payments, and under what situations they may receive those payments. Many states have also enacted laws limiting to whom child support payments may be disbursed, none of which allow payments to be made to private child support companies.<sup>23</sup> Furthermore, the Uniform Interstate Family Support Act (UIFSA), followed in all fifty states, makes no provision for the state to disburse to private child support companies.<sup>24</sup> Just as Congress could but chose not to, the respective state legislatures did not include private child support companies in the definition of entities to whom child support payments may be disbursed. Even a court has held that state child support enforcement agencies must disburse payments to the custodial parent and not a third party.<sup>25</sup>

In addition, at least one federal court has found the contract signed by a custodial parent and a private child support collection to *not* be a true assignment, but rather a contingency fee agreement.<sup>26</sup> Many states place restrictions, by statute, upon which causes of action are assignable, and limit the assignment

of child support only to the state.<sup>27</sup> Because the state is not in privity to the contract between the custodial parent and the child support company, there is neither a duty by the state to honor such a contract nor a cause of action against the state for failing to honor such a contract.<sup>28</sup>

## Conclusion

This note examined several legal issues surrounding private child support companies, not the propriety of some of their trade practices or the public policy arguments for or against these companies. While a custodial parent may enter a contract with a private company to collect child support, that company may collect, at most, only arrears not owed to a state. Some states even prohibit the collection of child support arrears through a contingency fee contract.

Regardless of what type of support these companies may collect, federal and state law prohibits state agencies from redirecting child support payments to private child support companies. Beyond the absence of statutory authorization, the contract between the custodial parent and the private child support company is a contingency fee arrangement to which the state is not a party. The state has no obligation to honor the contract.

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21. See 42 U.S.C. § 657.

22. See 45 C.F.R. § 302.38.

23. See, e.g., VA. CODE ANN. § 63.1-251.2 (2001) (requiring disbursing payment to the obligee within two business days of receipt); IOWA CODE § 252B.15 (2001); GA. CODE ANN. § 19-11-18(f) (2001); FLA. STAT. ch. 61.1824(1)(d)2 (2001); DEL. CODE ANN. § 2204(c) (2001); NEV. REV. STAT. 31A.300 (2001); MICH. COMP. LAWS § 552.509 (2002).

24. For instance, Virginia enacted the UIFSA at Code of Virginia sections 20-88.32 to .82. The Code of Virginia defines the term “obligee” at section 20-88.32 as

(i) an individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered, (ii) a state or political subdivision to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee, or (iii) an individual seeking a judgment determining parentage of the individual’s child.

VA. CODE ANN. § 20-88.32. Nowhere in the statutory definition does it provide that an “obligee” could be a private company. See *Commonwealth v. Chamberlain*, 31 Va. App. 533, 539-40 (Va. Ct. App. 2000) (discussing the history of the UIFSA and legislative history of the definition of “obligee”); see also UIFSA (1996) § 101, 9 U.L.A. 259 (1999).

25. See *Shipman v. City of New York Support Collection Unit*, 183 Misc. 2d 478 (N.Y. Sup. Ct. 2000).

26. See *Smith v. Child Support Enforcement*, 180 B.R. 648 (Bankr. D. Utah 1995) (due to no assignment of the arrearages to the child support company in satisfaction of a debt owed to it by the custodial parent, but rather an effort to collect overdue child support requiring the custodial parent to pay both a retainer and a percentage of child support arrearages recovered).

27. For example, Code of Virginia section 8.01-26 provides that only those causes of action for damage to real or personal property, whether such damage be direct or indirect, and causes of action *ex contractu* are assignable, unless otherwise provided by statute. See VA. CODE ANN. § 8.01-26. The underlying cause of action regarding the payment of child support is neither damage to real or personal property nor arising *ex contractu*. See *MNC Credit Corp. v. Sickels*, 255 Va. 314 (Va. 1998) (discussing common law assignments and Code of Virginia section 8.01-26). Code of Virginia section 63.1-273 provides that the receipt of public assistance creates an assignment on the behalf of the obligee to the Commonwealth. See VA. CODE ANN. § 63.1-273. Furthermore, Code of Virginia section 63.1’s definition of “assignment of rights” has no provision for making the assignment to a third party. See *id.* § 63.1.

28. See *Copenhaver v. Rogers*, 238 Va. 361 (Va. 1989); *Commonwealth v. Johnson*, 7 Va. App. 614 (Va. Ct. App. 1989).

While the collection of child support by state agencies is far from perfect, it at least assures the custodial parent and child that any money collected will be paid in full. Undoubtedly, some private child support companies may help combat the

national child support epidemic,<sup>29</sup> but as with any other business, the law limits what type of child support and from what sources private companies can collect.

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29. See Drew A. Swank, *The Constitutionality of Limitations on a Felon's Right to Procreate and the Need to Support Children*, 2002 INT'L FAM. L. 16 (Mar. 2002) (discussing the extent of the failure to pay child support in the United States).

# CLE News

## 1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, extension 304.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

## 2. TJAGSA CLE Course Schedule

### 2002

#### July 2002

|                           |  |
|---------------------------|--|
| 15 July -<br>13 September | 8th Court Reporter Course<br>(512-27DC5).      |
| 22-26 July                | 33d Methods of Instruction<br>Course (5F-F70). |

29 July -  
9 August

149th Contract Attorneys Course  
(5F-F10).

#### August 2002

5-9 August

20th Federal Litigation Course  
(5F-F29).

12-23 August

38th Operational Law Course  
(5F-F47).

12 August-  
22 May 03

51st Graduate Course (5-27-C22).

26-30 August

8th Military Justice Managers  
Course (5F-F31).

#### September 2002

9-13 September

173d Senior Officers Legal  
Orientation Course (5F-F1).

16-20 September

51st Legal Assistance Course  
(5F-F23).

16-27 September

18th Criminal Law Advocacy  
Course (5F-F34).

17 September -  
10 October

159th Officer Basic Course  
(Phase I, Fort Lee) (5-27-C20).

23-27 September

2002 USAREUR Legal  
Assistance CLE (5F-F23E).

#### October 2002

7-11 October

2002 JAG Worldwide CLE  
(5F-JAG).

11 October -  
19 December

159th Officer Basic Course  
(Phase II, TJAGSA)  
(5-27-C20).

21-25 October

3d Closed Mask Course  
(512-27DC3).

21-25 October

56th Federal Labor Relations  
Course (5F-F22).

21 October -  
1 November

5th Speech Recognition Training  
(512-27DC4).

21-25 October

2002 USAREUR Administrative  
Law CLE (5F-F24E).

|                         |   |                       |   |
|-------------------------|---|-----------------------|---|
| 23-25 October           | 1st Advanced Federal Labor Relations Course (5F-F21).                                   | 27-31 January         | 175th Senior Officers Legal Orientation Course (5F-F1).             |
| 28 October - 1 November | 2d Domestic Operational Law Course (5F-F45).  | 27-31 January         | 2003 Hawaii Estate Planning Course ( <b>TENTATIVE</b> ).            |
| 28 October - 1 November | 64th Fiscal Law Course (5F-F12).  | 27 January - 28 March | 9th Court Reporter Course (512-27DC5).                              |
| <b>November 2002</b>    |   | 31 January - 11 April | 160th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).           |
| 18-21 November          | 26th Criminal Law New Developments Course (5F-F35).                                     | <b>February 2003</b>  |   |
| 18-22 November          | 174th Senior Officers Legal Orientation Course (5F-F1).                                 | 3-7 February          | 79th Law of War Course (5F-F42).                                    |
| <b>December 2002</b>    |   | 10-13 February        | 2003 Maxwell AFB Fiscal Law Course (5F-F13A).                       |
| 2-6 December            | 2002 USAREUR Criminal Law CLE (5F-F35E).  | 10-14 February        | 2002 USAREUR Operational Law CLE (5F-F47E).                         |
| 3-6 December            | 2002 Government Contract & Fiscal Law Symposium (5F-F11).                               | 24-28 February        | 65th Fiscal Law Course (5F-F12).                                    |
| 9-13 December           | 6th Income Tax Law Course (5F-F28).   | 24 February - 7 March | 39th Operational Law Course (5F-F47).                               |
| 9-13 December           | 9th Fiscal Law Comptroller Accreditation Course Hawaii ( <b>TENTATIVE</b> ) (5F-F14-H). | <b>March 2003</b>     |   |
| <b>January 2003</b>     |   | 3-7 March             | 66th Fiscal Law Course (5F-F12).                                    |
| 5-17 January            | 2003 JAOAC (Phase II) (5F-F55).   | 10-14 March           | 27th Administrative Law for Military Installations Course (5F-F24). |
| 6-10 January            | 2003 USAREUR Contract & Fiscal Law CLE (5F-F15E).                                       | 17-21 March           | 4th Advanced Contract Law Course (5F-F103).                         |
| 6-10 January            | 2003 USAREUR Income Tax Law CLE (5F-F28E).  | 17-28 March           | 19th Criminal Law Advocacy Course (5F-F34).                         |
| 7 January - 31 January  | 160th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).                              | 24-28 March           | 176th Senior Officers Legal Orientation Course (5F-F1).             |
| 13-17 January           | 2003 PACOM Income Tax Law CLE (5F-F28P).  | 31 March - 4 April    | 14th Law for Paralegal NCOs Course (512-27D/20/30).                 |
| 21-24 January           | 2003 Hawaii Income Tax Law CLE (5F-F28H).   | <b>April 2003</b>     |   |
| 22-24 January           | 9th RC General Officers Legal Orientation Course (5F-F3).                               | 14-17 April           | 2003 Reserve Component Judge Advocate Workshop (5F-F56).            |
|                         |   | 21-25 April           | 1st Ethics Counselors Course (5F-F202).                             |
|                         |   | 21-25 April           | 14th Law for Paralegal NCOs Course (512-27D/20/30).                 |

|                          |  |                             |  |
|--------------------------|--|-----------------------------|--|
| 28 April -<br>9 May      | 150th Contract Attorneys Course<br>(5F-F10).   | 14-18 July                  | 80th Law of War Course<br>(5F-F42).                            |
| 28 April -<br>16 May     | 46th Military Judge Course<br>(5F-F33).  | 21-25 July                  | 34th Methods of Instruction<br>Course (5F-F70).                |
| 28 April -<br>27 June    | 10th Court Reporter Course<br>(512-27DC5).   | 28 July -<br>8 August       | 151st Contract Attorneys Course<br>(5F-F10).                   |
| <b>May 2003</b>          |  | <b>August 2003</b>          |  |
| 5-9 May                  | 4th Closed Mask Course<br>(512-27DC3).   | 4-8 August                  | 21st Federal Litigation Course<br>(5F-F29).                    |
| 5-16 May                 | 2003 PACOM Ethics Counselors<br>Workshop (5F-F202-P).  | 4 August -<br>3 October     | 11th Court Reporter Course<br>(512-27DC5).                     |
| <b>June 2003</b>         |  | 11-22 August                | 40th Operational Law Course<br>(5F-F47).                       |
| 2-6 June                 | 6th Intelligence Law Course<br>(5F-F41).   | 11 August 03 -<br>22 May 04 | 52d Graduate Course (5-27-C22).                                |
| 2-6 June                 | 177th Senior Officers Legal<br>Orientation Course (5F-F1).                                     | 25-29 August                | 9th Military Justice Managers<br>Course (5F-F31).              |
| 2-27 June                | 10th JA Warrant Officer Basic<br>Course (7A-550A0).  | <b>September 2003</b>       |  |
| 3-27 June                | 161st Officer Basic Course<br>(Phase I, Fort Lee) (5-27-C20).                                  | 8-12 September              | 178th Senior Officers Legal<br>Orientation Course (5F-F1).     |
| 9-11 June                | 6th Team Leadership Seminar<br>(5F-F52S).  | 8-12 September              | 2003 USAREUR Administrative<br>Law CLE (5F-F24E).              |
| 9-13 June                | 10th Fiscal Law Comptroller<br>Accreditation Course Alaska<br>( <b>TENTATIVE</b> ) (5F-F14-A). | 15-26 September             | 20th Criminal Law Advocacy<br>Course (5F-F34).                 |
| 9-13 June                | 33d Staff Judge Advocate Course<br>(5F-F52).   | 15-26 September             | 52d Legal Assistance Course<br>(5F-F23).                       |
| 16-20 June               | 7th Chief Paralegal NCO Course<br>(512-27D-CLNCO).   | 16 September -<br>9 October | 162d Officer Basic Course<br>(Phase I, Fort Lee) (5-27-C20).   |
| 16-20 June               | 14th Senior Paralegal NCO<br>Management Course<br>(512-27D/40/50).                             | <b>October 2003</b>         |  |
| 23-27 June               | 14th Legal Administrators Course<br>(7A-550A1).  | 6-10 October                | 2003 JAG Worldwide CLE<br>(5F-JAG).                            |
| 27 June -<br>5 September | 161st Officer Basic Course<br>(Phase II, TJAGSA) (5-27-C20).                                   | 10 October -<br>18 December | 162d Officer Basic Course<br>(Phase II, TJAGSA)<br>(5-27-C20). |
| <b>July 2003</b>         |  | 20-24 October               | 57th Federal Labor Relations<br>Course (5F-F22).               |
| 7 July -<br>1 August     | 4th JA Warrant Officer Advanced<br>Course (7A0550A2).  | 20-24 October               | 2003 USAREUR Legal<br>Assistance CLE (5F-F23E).                |

|                         |   |                         |   |
|-------------------------|---|-------------------------|---|
| 22-24 October           | 2d Advanced Labor Relations Course (5F-F21).              | 21-23 January           | 10th Reserve Component General Officers Legal Orientation Course (5F-F3). |
| 27-31 October           | 3d Domestic Operational Law Course (5F-F45).              | 26-30 January           | 180th Senior Officers Legal Orientation Course (5F-F1).                   |
| 27-31 October           | 5th Closed Mask Course (512-27DC3).                       | 26 January - 26 March   | 12th Court Reporter Course (512-27DC5).                                   |
| 27-31 October           | 67th Fiscal Law Course (5F-F12).                          | 30 January - 9 April 04 | 163d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).                  |
| 27 October - 7 November | 6th Speech Recognition Course (512-27DC4).                |                         |   |
| <b>November 2003</b>    |   | <b>February 2004</b>    |   |
| 12-15 November          | 27th Criminal Law New Developments Course (5F-F35).       | 2-6 February            | 81st Law of War Course (5F-F42).  |
| 17-21 November          | 3d Court Reporting Symposium (512-27DC6).                 | 9-12 February           | 2004 Maxwell AFB Fiscal Law Course ( <b>TENTATIVE</b> ) (5F-F13A).        |
| 17-21 November          | 179th Senior Officers Legal Orientation Course (5F-F1).   | 23-27 February          | 68th Fiscal Law Course (5F-F12).  |
| 17-21 November          | 2003 USAREUR Operational Law CLE (5F-F47E).               | 23 February - 5 March   | 41st Operational Law Course (5F-F47).                                     |
| <b>December 2003</b>    |   | <b>March 2004</b>       |   |
| 1-5 December            | 2003 USAREUR Criminal Law CLE (5F-F35E).                  | 1-5 March               | 69th Fiscal Law Course (5F-F12).  |
| 2-5 December            | 2003 Government Contract & Fiscal Law Symposium (5F-F11). | 8-12 March              | 28th Administrative Law for Military Installations Course (5F-F24).       |
| 8-12 December           | 7th Income Tax Law Course (5F-F28).                       | 15-19 March             | 5th Contract Litigation Course (5F-F102).                                 |
| <b>January 2004</b>     |   | 15-26 March             | 21st Criminal Law Advocacy Course (5F-F34).                               |
| 4-16 January            | 2004 JAOAC (Phase II) (5F-F55).                           | 22-26 March             | 181st Senior Officers Legal Orientation Course (5F-F1).                   |
| 5-9 January             | 2004 USAREUR Contract & Fiscal Law CLE (5F-F15E).         | <b>April 2004</b>       |   |
| 5-9 January             | 2004 USAREUR Income Tax Law CLE (5F-F28E).                | 12-15 April             | 2004 Reserve Component Judge Advocate Workshop (5F-F56).                  |
| 6-29 January            | 163d Officer Basic Course (Phase I, Fort Lee) (5-27-C20). | 19-23 April             | 6th Ethics Counselors Course (5F-F202).                                   |
| 12-16 January           | 2004 PACOM Income Tax Law CLE (5F-F28P).                  | 19-23 April             | 15th Law for Paralegal NCOs Course (512-27D/20/30).                       |
| 20-23 January           | 2004 Hawaii Income Tax Law CLE (5F-F28H).                 | 26 April - 7 May        | 152d Contract Attorneys Course (5F-F10).                                  |

|                          |  |   |   |
|--------------------------|--|---|---|
| 26 April -<br>14 May     | 47th Military Judge Course<br>(5F-F33).                            | 27 July -<br>6 August   | 153d Contract Attorneys Course<br>(5F-F10).   |
| 26 April -<br>25 June    | 13th Court Reporter Course<br>(512-27DC5).                         | <b>August 2004</b>  |   |
| <b>May 2004</b>          |  | 2-6 August  | 22d Federal Litigation Course<br>(5F-F29).  |
| 10-14 May                | 53d Legal Assistance Course<br>(5F-F23).                           | 2 August -<br>1 October   | 14th Court Report Course<br>(512-27DC5).  |
| 24-28 May                | 182d Senior Officers Legal<br>Orientation Course (5F-F1).          | 9-20 August   | 42d Operational Law Course<br>(5F-F47).   |
| <b>June 2004</b>         |  | 9 August -<br>22 May 05   | 53d Graduate Course (5-27-C22).   |
| 1-3 June                 | 6th Procurement Fraud Course<br>(5F-F101).                         | 23-27 August  | 10th Military Justice Managers<br>Course (5F-F31).  |
| 1-25 June                | 11th JA Warrant Office Basic<br>Course (7A-550A0).                 | <b>September 2004</b>   |   |
| 2-24 June                | 164th Officer Basic Course<br>(Phase I, Fort Lee) (5-27-C20).      | 7-10 September  | 2004 USAREUR Administrative<br>Law CLE (5F-F24E).   |
| 7-9 June                 | 7th Team Leadership Seminar<br>(5F-F52S).                          | 13-17 September   | 54th Legal Assistance Course<br>(5F-F23).   |
| 7-11 June                | 34th Staff Judge Advocate Course<br>(5F-F52).                      | 13-24 September   | 22d Criminal Law Advocacy<br>Course (5F-F34).   |
| 12-16 June               | 82d Law of War Workshop<br>(5F-F42).                               | <b>October 2004</b>   |   |
| 14-18 June               | 8th Chief Paralegal NCO Course<br>(512-27D-CLNCO).                 | 4-8 October   | 2004 JAG Worldwide CLE<br>(5F-JAG).   |
| 14-18 June               | 15th Senior Paralegal NCO<br>Management Course<br>(512-27D/40/50). | <b>3. Civilian-Sponsored CLE Courses</b>  |   |
| 21-25 June               | 15th Legal Administrators Course<br>(7A-550A1).                    | 23 August<br>ICLE   | Nuts & Bolts of Family Law<br>Hyatt Regency Hotel<br>Savannah, Georgia  |
| 25 June -<br>2 September | 164th Officer Basic Course<br>(Phase II, TJAGSA)<br>(5-27-C20).    | 6 September<br>ICLE   | U.S. Supreme Court Update<br>Swissotel<br>Atlanta, Georgia  |
| <b>July 2004</b>         |  | 27 September<br>ICLE  | Eight Steps to Effective Trial<br>National Speakers Series<br>Marriott Gwinnett Place Hotel<br>Atlanta, Georgia |
| 12 July -<br>6 August    | 5th JA Warrant Officer Advanced<br>Course (7A-550A2).              | <b>For further information on civilian courses in your area,<br/>please contact one of the institutions listed below:</b> |   |
| 19-23 July               | 35th Methods of Instruction<br>Course (5F-F70).                    | AAJE: American Academy of Judicial Education<br>P.O. Box 728<br>University, MS 38677-0728                                 |   |

(662) 915-1225

Tallahassee, FL 32399-2300

ABA: American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611  
(312) 988-6200

GICLE: The Institute of Continuing Legal  
Education  
P.O. Box 1885  
Athens, GA 30603  
(706) 369-5664

AGACL: Association of Government Attorneys  
in Capital Litigation  
Arizona Attorney General's Office  
ATTN: Jan Dyer  
1275 West Washington  
Phoenix, AZ 85007  
(602) 542-8552

GII: Government Institutes, Inc.  
966 Hungerford Drive, Suite 24  
Rockville, MD 20850  
(301) 251-9250

ALIABA: American Law Institute-American Bar  
Association  
Committee on Continuing Professional  
Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS or (215) 243-1600

GWU: Government Contracts Program  
The George Washington University  
National Law Center  
2020 K Street, NW, Room 2107  
Washington, DC 20052  
(202) 994-5272

ASLM: American Society of Law and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990

IICLE: Illinois Institute for CLE  
2395 W. Jefferson Street  
Springfield, IL 62702  
(217) 787-2080

CCEB: Continuing Education of the Bar  
University of California Extension  
2300 Shattuck Avenue  
Berkeley, CA 94704  
(510) 642-3973

LRP: LRP Publications  
1555 King Street, Suite 200  
Alexandria, VA 22314  
(703) 684-0510  
(800) 727-1227

CLA: Computer Law Association, Inc.  
3028 Javier Road, Suite 500E  
Fairfax, VA 22031  
(703) 560-7747

LSU: Louisiana State University  
Center on Continuing Professional  
Development  
Paul M. Herbert Law Center  
Baton Rouge, LA 70803-1000  
(504) 388-5837

CLESN: CLE Satellite Network  
920 Spring Street  
Springfield, IL 62704  
(217) 525-0744  
(800) 521-8662

MLI: Medi-Legal Institute  
15301 Ventura Boulevard, Suite 300  
Sherman Oaks, CA 91403  
(800) 443-0100

ESI: Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3202  
(703) 379-2900

NCDA: National College of District Attorneys  
University of Houston Law Center  
4800 Calhoun Street  
Houston, TX 77204-6380  
(713) 747-NCDA

FBA: Federal Bar Association  
1815 H Street, NW, Suite 408  
Washington, DC 20006-3697  
(202) 638-0252

NITA: National Institute for Trial Advocacy  
1507 Energy Park Drive  
St. Paul, MN 55108  
(612) 644-0323 in (MN and AK)  
(800) 225-6482

FB: Florida Bar  
650 Apalachee Parkway

NJC: National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557

|        |  |                  |   |
|--------|--|------------------|---|
| NMTLA: | New Mexico Trial Lawyers' Association<br>P.O. Box 301<br>Albuquerque, NM 87103<br>(505) 243-6003                                 | Colorado         | Anytime within three-year period  |
|        |  | Delaware         | 31 July biennially  |
|        |  | Florida**        | Assigned month triennially  |
| PBI:   | Pennsylvania Bar Institute<br>104 South Street<br>P.O. Box 1027<br>Harrisburg, PA 17108-1027<br>(717) 233-5774<br>(800) 932-4637 | Georgia          | 31 January annually   |
|        |  | Idaho            | 31 December, Admission date triennially   |
| PLI:   | Practicing Law Institute<br>810 Seventh Avenue<br>New York, NY 10019<br>(212) 765-5700   | Indiana          | 31 December annually  |
|        |  | Iowa             | 1 March annually  |
|        |  | Kansas           | 30 days after program   |
| TBA:   | Tennessee Bar Association<br>3622 West End Avenue<br>Nashville, TN 37205<br>(615) 383-7421                                       | Kentucky         | 30 June annually  |
|        |  | Louisiana**      | 31 January annually   |
| TLS:   | Tulane Law School<br>Tulane University CLE<br>8200 Hampson Avenue, Suite 300<br>New Orleans, LA 70118<br>(504) 865-5900          | Maine**          | 31 July annually  |
|        |  | Minnesota        | 30 August   |
|        |  | Mississippi**    | 1 August annually   |
| UMLC:  | University of Miami Law Center<br>P.O. Box 248087<br>Coral Gables, FL 33124<br>(305) 284-4762                                    | Missouri         | 31 July annually  |
|        |  | Montana          | 1 March annually  |
|        |  | Nevada           | 1 March annually  |
| UT:    | The University of Texas School of Law<br>Office of Continuing Legal Education<br>727 East 26th Street<br>Austin, TX 78705-9968   | New Hampshire**  | 1 August annually   |
|        |  | New Mexico       | prior to 30 April annually  |
|        |  | New York*        | Every two years within thirty days after the attorney's birthday  |
| VCLE:  | University of Virginia School of Law<br>Trial Advocacy Institute<br>P.O. Box 4468<br>Charlottesville, VA 22905.                  | North Carolina** | 28 February annually  |
|        |  | North Dakota     | 31 July annually  |
|        |  | Ohio*            | 31 January biennially   |
|        |  | Oklahoma**       | 15 February annually  |
|        |  | Oregon           | Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially |

#### 4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

| <u>Jurisdiction</u> | <u>Reporting Month</u> |  |  |
|---------------------|------------------------|--|--|
| Alabama**           | 31 December annually   |  |  |
| Arizona             | 15 September annually  |  |  |
| Arkansas            | 30 June annually       |  |  |
| California*         | 1 February annually    |  |  |

|                  |  |
|------------------|--|
| Pennsylvania**   | Group 1: 30 April<br>Group 2: 31 August<br>Group 3: 31 December        |
| Rhode Island     | 30 June annually   |
| South Carolina** | 15 January annually  |
| Tennessee*       | 1 March annually   |
|                  | Minimum credits must be completed by last day of birth month each year |
| Utah             | 31 January   |
| Vermont          | 2 July annually  |
| Virginia         | 30 June annually   |
| Washington       | 31 January triennially   |
| West Virginia    | 30 July biennially   |
| Wisconsin*       | 1 February biennially  |
| Wyoming          | 30 January annually  |

\* Military Exempt

\*\* Military Must Declare Exemption

For addresses and detailed information, see the September/October 2001 issue of *The Army Lawyer*.

## 5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2002**, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 October 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel J T. Parker, telephone (434) 552-3978, ext. 357, or e-mail JT.Parker@hqda.army.mil.

## Current Materials of Interest

### 1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available Through the DTIC, see the March 2002 issue of *The Army Lawyer*.

### 2. Regulations and Pamphlets

For detailed information, see the March 2002 issue of *The Army Lawyer*.

### 3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

#### b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OT-JAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

#### c. How to logon to JAGCNet:

(a) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(b) Follow the link that reads “Enter JAGCNet.”

(c) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “password” in the appropriate fields.

(d) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(e) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(f) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(g) Once granted access to JAGCNet, follow step (c), above.

### 4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2002 issue of *The Army Lawyer*.

### 5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General’s School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by calling the LTMO at (434) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School’s Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is Web browser accessible before departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have Web accessi-

ble e-mail, you may establish an account at the Army Portal, <http://ako.us.army.mil>, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (434) 972-6264. CW3 Tommy Worthey.

## **6. The Army Law Library Service**

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS

FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (434) 972-6394, facsimile: (434) 972-6386, or e-mail: [lullnc@hqda.army.mil](mailto:lullnc@hqda.army.mil).

## **7. Kansas Army National Guard Annual JAG Officer's Conference**

The Kansas Army National Guard is hosting their Annual JAG Officer's Conference at Washburn Law School, Topeka, Kansas, on 20-21 October 2002. The point of contact is Major Jeffry L. Washburn, P.O. Box 19122, Pauline, Kansas 66619-0122, telephone (785) 862-0348.

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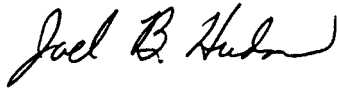
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